

DOCKET NO. LND-HHD-CV-18-6097370-S

500 NORTH AVENUE, LLC

vs.

TOWN OF STRATFORD ZONING
COMMISSION

SUPERIOR COURT

JD. OF HARTFORD

AT HARTFORD

JANUARY 22, 2019

BRIEF OF DEFENDANT TOWN OF STRATFORD ZONING COMMISSION

I. PRELIMINARY STATEMENT

Plaintiff's proposed development – a 116-unit apartment building on approximately fifteen acres – poses a substantial threat to the public health, safety, and other vital matters affecting the public interest, and these interests clearly outweigh the need for affordable housing. This matter comes to the Court as an affordable housing appeal brought pursuant to CGS Section 8-30g, from the decision by Defendant Town of Stratford Zoning Commission (the "Commission") denying Plaintiff's site plan, zone change and special case applications. The record amply supports the Commission's findings. Specifically, the Commission appropriately determined that the Plaintiff's applications should be denied due to:

- A) irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem and irreversible, long-term degradation of the Roosevelt Forest;
- B) clear public danger to residents, children, and emergency first responders due to a 30' tall retaining wall which would not support any large equipment, including fire apparatus responding to emergencies on site; and
- C) several traffic safety concerns.

For these reasons, the Commission's decision should be upheld, and this appeal should be dismissed.

II. STATEMENT OF FACTS

The project is proposed for property, located at 795 James Farm Road in Stratford, Connecticut (the "Property"). The Property is 15.5607 acres, zoned residential, RS-1 as defined by the Zoning Regulations of the Town of Stratford (the "Regulations"). It is currently improved by a single residential home. The area is peppered with other residential homes in an otherwise generally wooded area.

Prior to the present application, in June of 2015, the Plaintiffs sought a zoning amendment and zone change in addition to a site plan approval to construct 72 units of affordable housing. Plaintiffs withdrew the original application and filed, on or about November 10, 2017, the present applications for a text amendment, zone change, special case approval of their site plan for a massive four-story apartment complex with 116 units above parking (the "Applications"). The Applications sought permission to demolish the existing residential building, proposed parking for 215 vehicles and proposed the construction of a second access road to reach the complex.

The Commission opened a public hearing on the Applications on October 20, 2017 and continued it on January 30, 2018, April 25, 2018, and May 9, 2018. As more fully set forth below, the hearing included multiple presentations and expert reports from the Applicant, neighbors and other interested parties. The experts included engineering expert Rene Basulto, wetland expert George Logan, and soil scientist Steven Danzer. A General Statutes Section 22a-19 Notice of Intervention and Verified Pleading was filed as well.

The Commission deliberated on May 9, 2018 and voted unanimously to deny the Applications. By letter dated May 10, 2018, the Commission notified the Plaintiff of its decision. The Commission concluded that there were significant concerns with traffic safety, environmental

issues, and construction plans, and as a threshold matter the Applications were incomplete and could not be approved. ROR p. 729 (Public Hearing Transcript)¹.

III. STANDARD OF REVIEW

Pursuant to Connecticut General Statutes Section 8-30g(f), any person whose affordable housing application is denied may appeal such decision to the Superior Court. Section 8-30g(g) then states in relevant part:

Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development. . . .

In considering whether a commission's decision on an affordable housing application is supported by sufficient evidence, our Supreme Court has instructed that "the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." River Bend Associates, Inc. v. Zoning

¹ Citations to the Return of Record (ROR) are in accordance with the ROR as filed on the judicial website.

Commission, 271 Conn. 1, 26 (2004). These determinations present “mixed factual and legal determinations, the legal components of which are subject to plenary review. . . [However], the commission remains the finder of fact and any facts found are subject to the ‘sufficient evidence’ standard of judicial review.” Id.

“[S]ufficient evidence in this context . . . mean[s] less than a preponderance of the evidence, but more than a mere possibility . . . [T]he zoning commission need not establish that the effects it sought to avoid by denying the application are definite or more likely than not to occur, but that such evidence must establish more than a mere possibility of such occurrence.”

Christian Activities Council, Congregational v. Town Council, 249 Conn. 566, 585 (1999)

(citation and internal quotation marks omitted). “[T]he statute does not impose on the commission a burden of proving facts as that concept is traditionally understood in the fact finding context. . . . Rather, the burden imposed by [Section] 8-30g(g)(1) is akin to the burden imposed on a party who seeks to have a statute declared unconstitutional, which is a legal determination . . . This burden is met not by proving facts to a given level of certainty, but by presenting persuasive legal and policy arguments.” River Bend Associates, Inc. v. Zoning Commission, 271 Conn. at 25 n.14 (citations and internal quotation marks omitted).

Because the commission remains the finder of fact, notwithstanding the burden shifting that applies in affordable housing appeals, the credibility of witnesses and determination of issues of fact remain solely within the province of the commission. Harris v. Zoning Commission, 259 Conn. 402, 416 (2002). In making factual findings, the commission may weigh evidence provided by expert and lay witnesses, and the commission is not compelled to believe any particular evidence or testimony. Kaufman v. Zoning Commission, 232 Conn. 122, 156-57 (1995). “[T]he possibility of deriving two inconsistent conclusions from the evidence

does not prevent an administrative agency's finding from being supported by [sufficient] evidence [either]." Landmark Development Group v. Zoning Commission, Superior Court, J.D. of New Britain, No. CV 054002278, 2008 WL 544646, *21 (Feb. 2, 2008, *Prescott, J.*) (copy attached), citing Samperi v. Inland Wetlands Agency, 266 Conn. 579, 588 (1993) (internal quotation marks omitted). Commission members also may rely on their own knowledge of "matters readily within their competence, such as traffic congestion and street safety." Feinson v. Conservation Commission, 180 Conn. 421, 427 (1980).

A commission's decision in "an affordable housing land use appeal, as in a traditional zoning appeal . . . must be sustained if even one of the stated reasons is sufficient to support it." Mackowski v. Planning & Zoning Commission, 59 Conn. App. 608, 615 (2000) (citation and internal quotation marks omitted).

IV. ARGUMENT

A. The Commission Properly Denied the Applications Due to Irreversible Damage to the Surrounding Wetlands.

It has been clearly established that a "protection of our environmental resources is unquestionably a substantial public interest." Garden Homes Management Corp. v. Westport Planning and Zoning Comm., Superior Court, J.D. of Hartford, No. LND CV166067291S, 2017 WL 3470742, *9 (May 25, 2017, *Berger, J.*) (copy attached); Conn. Gen. Stat. § 22a-91. The Legislature has stated that "[t]he preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state." Conn. Gen. Stat. § 22a-36. Because these wetlands and their surrounding ecosystems are "indispensable and irreplaceable," their protection from destruction, in any form, is a legitimate

and essential public interest which reasonably forms the basis for the denial of an affordable housing application. Id.

In the instant case, the Commission provided an abundance of evidence to support their decision that Plaintiff's proposed development would cause irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem. Most significantly, as more fully set forth below, the Commission was entitled to rely on the opinion of Soil Scientist Steven Danzer, Ph.D., as an expert who opined that the Applications should be denied, because the Applications lacked sufficient detail to be verifiable by the Commission without having been previously evaluated by the Wetland Commission. ROR p. 326-327 (Wetland Report Steve Danzer). According to expert Danzer, the wetland boundary survey submitted as part of the Applications is incomplete regarding the northwestern corner of the property, lacks a soil report, and lacks sufficient detail to be considered verifiable. ROR p. 326 (Wetland Report Steve Danzer).

Not only does Plaintiff's proposed project threaten irreversible damage to the surrounding wetlands, but it creates a risk of irreparable, long-term degradation to Roosevelt Forest and Cemetery Brook. The proposed building is to be located directly adjacent to dense brush and forest which creates an increased risk of fire to Roosevelt Forest. ROR p. 328 (Wetland Report Steve Danzer). In determining the increased risk of fire to Roosevelt Forest, expert Danzer considered two components:

- 1) The increased risk due to the inherent time lag involved with (and the difficulty of) trying to contain any structural fire that may occur within the development footprint before any of the embers spread into the adjacent naturally vegetated areas, and,
- 2) The increased risk of fire to the forest due to the reasonably expected increase in human activity that will occur in, or next to, the forest due to several hundred new residents (including trespass and picnicking in the natural areas, and the use of outdoor barbeque grills on the property). ROR p. 328 (Wetland Report Steve Danzer).

Danzer).

The increased fire risk of Plaintiff's plan is heightened further by Plaintiff's failure to consider the risk of fire to the forest when creating their overall plan. The Applications did not include any type of Fire Prevention Plan or any Fire Management Plan addressing Roosevelt Forest. ROR p. 329 (Wetland Report Steve Danzer). Furthermore, there has been little, if any, acknowledgement by Plaintiff as to the unique environmental challenge the project poses by suggesting the creation of a dense urban development in close proximity to a forest. ROR p. 328 (Wetland Report Steve Danzer). The Commission was justified in denying Plaintiff's application as the project will unnecessarily increase the risk of fire and degradation of Roosevelt Forest because the Plaintiff has inadequately addressed the issue. ROR p. 329 (Wetland Report Steve Danzer).

On top of the increased fire risk, Plaintiff's project also lacked consideration as to the light pollution and other intrusions into the adjacent forest and wetlands. ROR p. 329 (Wetland Report Steve Danzer). Roosevelt Forest, a treasure of the Town of Stratford, contains the largest single piece of core forest (a forest tract greater than 250 acres) within the Town and within a 4-mile radius. ROR p. 329 (Wetland Report Steve Danzer). The importance of core forests is to attract wildlife that depend on larger tracts of land. ROR p. 329 (Wetland Report Steve Danzer). If Plaintiff's development is built, it will subject Roosevelt Forest to lighting impacts, trespass, objectionable noise, and other hazards deriving from the activities of residents living in 116 dwelling units. ROR p. 329 (Wetland Report Steve Danzer). Due to the impending light pollution, nuisances, and other hazards that accompany 116 residential units, the project proposed by the Applications is not compliant with Environmental Protection Standards of the

Stratford Zoning Regulations or with the Forest Management Plan for Roosevelt Forest in particular. ROR p. 329 (Wetland Report Steve Danzer).

Lighting impacts, trespass, and nuisance are three main concerns with respect to preserving Roosevelt Forest throughout this project. Artificial lighting used during construction, used to illuminate parking lots once built, and used by human inhabiting the 116 residential units built according to the plans of the Applications will irreversibly damage various species living in Roosevelt Forest. Artificial lighting is known to prolong a frog's sense of day, inhibiting its abilities to conduct normal nocturnal activities. ROR p. 330 (Wetland Report Steve Danzer). Unnatural lighting has been shown to disrupt amphibian mating rituals, affect ease of movement, disrupt melatonin production, and often make frogs and salamanders more subject to predation. ROR p. 330 (Wetland Report Steve Danzer). While artificial lighting is a danger to surrounding forests and wetlands in general, Roosevelt Forest is particularly susceptible based on the powerline corridor which will be adjacent to the proposed apartment complex. ROR p. 330 (Wetland Report Steve Danzer). Because utility companies prevent the use of high statured trees near their powerlines to prevent interference, Roosevelt Forest will lose the buffer large trees naturally provide. Instead, Roosevelt Forest will be "the recipient of the light emitted from the apartment complex" as the low statured brushy species surrounding the apartment will be inadequate to shade the surrounding forest. ROR p. 330 (Wetland Report Steve Danzer).

The lack of statured trees in the powerline corridor will not only increase the amount of artificial lighting affecting the Forest but will also increase the amount of noise that impacts the Forest. A lack of mature trees inadequately buffers the forest from noise, not only from the 116-unit complex itself, but from the neighboring road. ROR p. 331 (Wetland Report Steve Danzer). This concern will be increasingly heightened in this area after "the removal of every tree within

200 feet of the road.” ROR p. 331 (Wetland Report Steve Danzer). As it stands today, there are 136 properties adjacent to Roosevelt Forest and 123 of those properties are currently developed parcels, each containing a single-family home. ROR p. 582 (Adjacent Land Use Around Roosevelt Forest). It is undisputed that a 116-residential unit complex will generate exponentially more noise and light than a single-family dwelling would on the same parcel. ROR p. 331 (Wetland Report Steve Danzer).

Equally important to the threat of light and noise pollution is the threat of trespass onto Roosevelt Forest. As proposed, the Applications lack adequate recreational space to keep residents and guests of the 116 units within the property bounds and out of Roosevelt Forest. ROR p. 331 (Wetland Report Steve Danzer). Though some trespass is to be expected with 116 residential units, the lack of adequate recreational space creates situations that “invite future disturbance by the public into the more natural areas.” ROR p. 331 (Wetland Report Steve Danzer). Furthermore, this trespass on natural areas will undoubtedly lead to permanent landscape disturbance into Roosevelt Forest, which is supposed to be protected and preserved. ROR p. 331 (Wetland Report Steve Danzer).

Roosevelt Forest has been designated as a high-quality area which must be “preserved for wildlife *without disturbance from active or passive recreational uses that involve people*.” ROR p. 329 (Wetland Report Steve Danzer). Roosevelt Forest is a recognized sanctuary for wildlife, housing a number of threatened and endangered species, including the Eastern Box Turtle. ROR p. 329 (Wetland Report Steve Danzer). The Eastern Box Turtle, one of Connecticut’s most familiar species of turtles, is known for its yellow and orange blotches, mimicking sunlight hitting the forest floor. ROR p. 533 (Eastern Box Turtle Information). The Eastern Box Turtle is so named as it is the only Connecticut turtle that can completely withdraw into its shell. *Id.* This

species was once abundant throughout Connecticut; however, since 1998 the Eastern Box Turtle has been listed as a “species of special concern” in Connecticut and is also currently protected from international trade. ROR p. 534 (Eastern Box Turtle Information).

It has been established that the main threats to the species in Connecticut include “loss and fragmentation of habitat due to deforestation and spreading suburban development.” ROR p. 534 (Eastern Box Turtle Information). Though loss of habitat is only one threat posed to the turtles, it is arguably the greatest threat as turtles are frequently killed “directly by construction activities,” by the loss of areas for shelter, food, and nesting, or when habitats are destroyed altogether. ROR p. 534 (Eastern Box Turtle Information). Because of the box turtles’ unique shells, it is not a natural predator that ultimately threatens their existence, it is urban development and construction. ROR p. 534 (Eastern Box Turtle Information).

The implementation of a fragile retaining wall is another threat posed by the Applications as they stand. If the retaining wall was to spontaneously rupture, the debris and destruction caused by the more than 30,000 cubic feet of fill would be catastrophic to the nearby Cemetery Brook. Cemetery Brook “is a fast-flowing riffly stream” filled with cold water fish species including trout, white suckers, and dace. ROR p. 578 (REMA Report). The fast-flowing water within the Brook naturally irrigate the forest at the bottom of the slope and provides a habitat perfect for a variety of trees including red maple, hickory, black oak, green ash, and massive tulip trees. ROR p. 579 (REMA Report). If the retaining wall were to break, the sediment released would cover the gravelly substrate and eliminate the breeding habitat and aquatic productivity within the Brook ROR p. 578 (REMA Report).

As proposed, the Applications seriously threaten the wetlands surrounding the project site, the upland habitat, and the wildlife that rely on the unharmed existence of natural habitats to

survive. ROR p. 332 (Wetland Report Steve Danzer). As it stands, the Applications lack sufficient materials to demonstrate a thorough investigation into the habitat, the species, the guidelines of the Erosion Control Plan, or the Environmental Protection Standards required by the Town of Stratford. ROR p. 332 (Wetland Report Steve Danzer).

The activities proposed in the Applications will significantly impact and affect the wetlands and the surrounding habitats. This project threatens the safety of endangered, threatened, and special concern species of wildlife in Roosevelt Forest, including the Eastern Box Turtle, the Pied-Billed Grebe, and multiple species of frogs and salamanders. ROR p. 263 (22a-19 Verified Pleading Judith Kurmay, Cathleen Martinez, Concerned Citizens Group of Stratford). These actions will result in irreversible damage to the wetlands and the wildlife sanctuaries that are Roosevelt Forest, Cemetery Brook, and the other surrounding wetlands. For all of these reasons, the Commission properly denied the Applications based on the irreversible damage to the surrounding wetlands, wildlife, and forests.

B. The Commission Properly Denied the Applications Due to Clear Public Danger to residents, children, and emergency first responders due to insufficient access of large fire equipment.

A zoning commission may deny an affordable housing application “where there is a *possibility* that approval of the application could result in . . . physical injury to residents of the development as long as there is a reasonable basis in the record for concluding that its denial was necessary to protect the public interest.” Ensign-Bickford Realty Corp. v. Zoning Commission, Superior Court, J.D. of Hartford, No. CV 940544054S, 1996 WL 737495, *6 (Dec. 16, 1996, *Mottolese, J.*) appeal dismissed, 245 Conn. 257 (1998) (citation and internal quotation marks omitted; emphasis in original) (copy attached); Avalonbay-Communities, Inc. v. Planning & Zoning Commission, Superior Court, J.D. of New Britain, No. CV 000500917, 2001 WL

1178638, *14 (Sept. 6, 2001, *Munro, J.*) (citation and internal quotation marks omitted; emphasis added) (copy attached) (citing Kaufman v. Zoning Commission, 232 Conn. 122, 156 (1995).

“Affordable housing units should be just as safe as any other form of housing.” Garden Homes Management Corp. v. Planning and Zoning Com’n of Town of Oxford, Superior Court, J.D. of New Britain, No. HHBCYV074015729S, 2009 WL 4282204, *12 (Nov. 9, 2009, *Pickard, J.*) (copy attached). Health and safety benefits such as a roadway that is insufficient to permit the entrance of large fire trucks is a justifiable reason to deny an affordable housing appeal. *Id.*

As written, the Applications do not properly account for the sheer size and stature of the Town’s two main fire engines. According to Deputy Chief Jon Gottfried, the Town of Stratford’s primary aerial apparatus truck (Truck 1) weighs around 72,000 lbs. and requires a minimal natural grade to operate properly. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). Additionally, due to Truck 1’s weight and force level, the overall driveway road grade cannot be in excess of 8.5 degrees. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). Finally, with the length of Truck 1 being around 551 inches and the width being approximately 100 inches without the additional 7 feet added to each side of the engine by the outrigger stabilizing systems, the Applications would need to specifically prepare the proposed entrances and exits to hold the massive pieces of equipment. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). The department’s second ladder truck (Truck 2) is larger than Truck 1 in every dimension. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried).

Deputy Chief Gottfried’s review of the Applications left him with the opinion that “access to and around the site for our two ladder trucks will be significantly impeded.” ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). As proposed, the

driveways used to access the site are too narrow and restrictive for a ladder truck to make a clean turn. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). Instead the truck would have to stop and back up in order to enter the property which would slow the response time. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). As part of the Deputy Chief's review, he tested emergency response times based on a normal traffic flow and a second alternative route if there was a full blockage of the roadway. Based on the length of the response using the alternative route (even without heavy rush hour traffic), Chief of the Department, Robert McGrath, required the Plaintiff establish "an engine company staffed by four firefighters be hired at the developers cost and stationed at the intersection of Harvest Ridge Road and James Farms Road to respond to incidents south of the blockage during any times that the roadway is blocked." ROR p. 529 (Letter to Atty. Kubic From Deputy Fire Chief). Plaintiffs have not presented any evidence or other documentation that they have or are planning to establish a new engine company in the location required by the Chief.

Safety of residents and emergency vehicles is further impeded by the limited access to and from the complex. While there are two points of entry to the complex, both are attached to one main road, James Farm Road. According to the Stratford Police Department, "116 Units placed in the middle of a residential setting with one street (James Farm) in or out will certainly cause a traffic issue for that area. This is likely to cause more accidents, traffic congestions and more town services to maintain the roadway and area." ROR p. 96 (Staff Comments from Stratford Police Department). Additionally, the lack of access and egress presented by the one main road is a concern for emergency vehicles, particularly larger fire engines. ROR p. 96 (Staff Comments from Stratford Police Department).

Additional problems for responding emergency services are caused by the location of the proposed retaining wall. The retaining wall is “precariously close” to the edge of the rear access driveway. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). Plaintiffs proposed installing a guard rail before the retaining wall to prevent any vehicles from hitting the wall. However, the proposed guard rail will do little to stop a 70,000-pound vehicle. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). The more likely situation, especially during the winter when snow and ice could coat the steep grade driveway, is that the fire engine will drive through the guard rail and cause the engine to fall down a 20-foot drop. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). Not only is the placement of the retaining wall an issue for stopping purposes, but the location will likely have a negative effect on the operation of the fire engine. ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried). The height of the retaining wall will bring the engine dangerously close “to the Eversource overhead high-tension lines which is a significant safety hazard for our firefighters if we have to deploy the apparatus boom to fight a fire or effect rescue in the rear building.” ROR p. 524 (Memo to Zoning Commission from Deputy Fire Chief Gottfried).

Not only would the 30-foot retaining wall impede the ingress and egress of fire trucks and emergency vehicles, but it also has the potential to further impact the surrounding wetlands. The wetlands will face an accelerated erosion of the hillside if any piece of physical debris falls from a failed wall. ROR p. 332 (Wetland Report). If the wall fails, even slightly, the failure will result in pollution to the aquatic environment, smothered vegetation, and other negative impacts that will not only affect the wetlands but the entire surrounding wildlife. ROR p. 332 (Wetland Report).

An additional threat to the safety of entering emergency vehicles is the slope created post-construction. Engineering expert Rene Basulto found that the very steep slope posed “many challenges for first responders to access and maneuver in and throughout the site.” ROR p. 286 (Engineer’s Report). As the property currently sits, the area proposed for development sits on a slope of approximately 20 percent. ROR p. 264 (22a-19 Verified Pleading Judith Kurmay, Cathleen Martinez, Concerned Citizens Group of Stratford). According to conservation administrator Christina Batoh, the post-construction slope for vehicles coming in and out of the property is a 12 percent slope. ROR p. 190 (Transcript). The National Fire Protection Association (NFPA) has developed a set of standards to aid in the prevention and elimination of death, injury, and property and economic loss due to fire and other related hazards. Section 18.2.3.4.6.2 of the NFPA codes states that “the angle of approach and departure for any means of fire department access road not exceed 1-foot drop in 20 feet (5% slope) of the design limitations of the fire apparatus of the fire department and be subject to approval by the [Authority having Jurisdiction].” ROR p. 287 (Engineer’s Report). The slope within the Applications as proposed has not been approved by Deputy Chief Lampart (the Authority having Jurisdiction). Expert Basulto determined that,

“[t]he slope on the site in several locations is approximately 10% (which equates to a 1 ft drop in 10 ft). This exceeds the maximum slope established by code. This is a code violation, and will endanger the life safety, and welfare of the first responders. As such the life, safety and welfare of the residents is also jeopardized as well.” ROR p. 288 (Engineer’s Report).

Even though the code explicitly states any slope greater than 5 percent is a violation of the NFPA code, Manuel Silva, Plaintiff’s expert, originally proposed at a public hearing that 10

percent was an acceptable slope. ROR p. 540 (Excerpt Zoning Commission Public Hearing 10/20/16). Mr. Silva also argued to the town that because of how difficult it would already be for the developers to reach an average slope grade of 10 percent, he did not think it was wise to create a second access way for emergency vehicles. ROR p. 540 (Excerpt Zoning Commission Public Hearing 10/20/16).

This slope, while not only extremely dangerous for large vehicles coming in and out of the complex, will cause strain on the storm-water control systems and on the retaining wall. ROR p. 190 (Transcript – 500 North Ave LLC v. Gary Lorenston Planning and Zoning Administrator). To develop a slope of this magnitude, the property would need about 50,000 cubic yards of fill. ROR p. 190 (Transcript – 500 North Ave LLC v. Gary Lorenston Planning and Zoning Administrator). However, the retaining wall proposed in the Applications is supposed to support 30,000 cubic yards of fill. ROR p. 578 (Verified Pleading Town of Stratford). Accordingly, the engineers consulted have determined the proposed “C”-shaped retaining wall has a high likelihood of failure. ROR p. 578 (Verified Pleading Town of Stratford). Filling this property appropriately is a massive undertaking that Plaintiff has not properly prepared for and as a result the storm water retention system is inadequate, and the retaining wall will likely fail. Plaintiff has also failed to show how the proposed retaining wall would support the weight of the 72,000 lb. fire engine, should there be an emergency. Without adequate plans for the retaining wall, Expert Basulto determined that as submitted, the Applications did not meet the International Fire Code. ROR p. 290 (Engineer’s Report).

A failure of the proposed retaining wall would cause the 30,000 yards, or more, of fill to stream downhill towards Cemetery Pond Brook and its surrounding wetlands. ROR p. 578 (Verified Pleading Town of Stratford). Disrupting the environment of Cemetery Pond Brook

would significantly degrade the environment and the wildlife within. ROR p. 580 (Verified Pleading Town of Stratford). As the enormous amount of sediment is released into the brook, it would also cause an overgrowth of algae and a release of nutrient inputs which would contribute to hypoxia in the Long Island Sound. ROR p. 580 (Verified Pleading Town of Stratford). In other cases, when retaining walls have failed the fallout was catastrophic. Falling and avalanching debris caused access roads to close, destroyed buildings and roadways, and literal landslides left trails of destruction. ROR p. 549-552 (Concerned Citizens Group of Stratford Questions). According to George T. Logan, professional Wetland Scientist, the proposed retaining wall “will result in irreversible short-term and long-term adverse impacts upon wetlands and watercourses, upon the wildlife that inhabit these habitats, and upon the functions and values these regulated resources provide, not only at the subject site, but also off-site and down gradient.” ROR p. 581 (Verified Pleading Town of Stratford).

Even if the retaining wall is installed properly, the creation of the wall is an enormous project and is likely to cause “serious consequences on the surrounding landscape.” ROR p. 264 (Verified Pleading Judith Kurmay, Cathleen Martinez, Concerned Citizens Group of Stratford). During the construction phase, “a single storm event” can cause fill to plummet toward the surrounding wetland if the drainage system is not installed properly. ROR p. 264 (Verified Pleading Judith Kurmay, Cathleen Martinez, Concerned Citizens Group of Stratford). As it stands, Plaintiff has not provided any information on the phasing of the retaining wall construction. ROR p. 264 (Verified Pleading Judith Kurmay, Cathleen Martinez, Concerned Citizens Group of Stratford).

While the retaining wall and the slow response times due to impeded ingress are two very significant issues with the Applications, the Fire Marshal found additional problems with the

current proposal during his review of the location. Based on the Applications, the distance proposed to the nearest existing hydrant is too far as it would require two fire engines with hoses strung together to reach the complex. ROR p. 584 (Letter from Rose Tiso). As proposed, the closest fire hydrant is one third of a mile away from the building. ROR p. 644 (Public Hearing Transcript). Because of the distance, fire fighters would have to hook up two trucks which will likely take between 5 to 7 minutes to set up. ROR p. 644 (Public Hearing Transcript). In a time of emergency, 5 to 7 minutes can mean life or death. Before the Applications could be approved, Brian Lampart, the Stratford Fire Marshall, would require new hydrants on or near the site. ROR p. 584 (Letter from Rose Tiso).

The retaining wall and the overall grade and slope of the project pose significant threats to the safety of the first responders and the residents of the proposed complex. Engineering experts found that the Applications violated the NFPA code in several places including the angle of approach and the slope leading to the property. Experts determined these violations “cause a health and safety risk to the occupants and emergency personnel.” ROR p. 288 (Engineer’s Report). These probable safety threats, combined with several expert determinations that the Applications were inadequate when it came to the plans and proportions of the safety wall, provided the Commission with a justifiable reason to deny Plaintiff’s application. Therefore, the Commission properly denied the Applications based on the danger posed to the public and to emergency services by the 30-foot retaining wall.

C. The Commission Properly Denied the Applications Due to a Variety of Traffic Safety Concerns Associated with the Proposed Development.

Traffic safety concerns also can serve as the basis for denial of an affordable housing application. Avalonbay Communities, Inc. v. Planning & Zoning Commission, *supra*, Superior

Court, No. CV 000500917. The Commission in the present case heard substantial evidence about safety issues resulting from the significant increase in traffic that the proposed 116-unit residential building would generate, and appropriately determined that this was another ground for denying the Applications.

Plaintiffs provided a traffic study detailing the proposal for 215 parking spaces for 116 units. ROR p. 731-775 (Traffic Impact Study). Plaintiff's Traffic Engineer also provided follow-up documentation in response to issues and concerns raised by both the Commission and neighbors. Nevertheless, several traffic safety concerns remained, as demonstrated by substantial evidence in the record. These traffic safety concerns included increase in traffic accidents due to the overcrowding of an already narrow road, line of sight issues for vehicles exiting the complex, and significant delays of emergency response time due to increased traffic.

At the continued public hearing in March 2018, Lieutenant Gugliotti of the Stratford Police Department submitted and reported the finding of the NuMetrics Traffic Analyzer Study that was conducted. The Lieutenant expressed concerns not only with the increase in traffic but with the specific angle of the driveway that was proposed. ROR p. 633 (Public Hearing Transcript). According to the Lieutenant, their study found line of sight hazards and difficulty seeing in both directions. ROR p. 633 (Public Hearing Transcript). Based on a traffic study conducted by the Stratford Fire Department, the additional traffic caused by the development of the 116 unit complex could significantly affect the response time by the department and therefore, Chief McGrath refused to sign off on the development unless the developer paid for a new fire company (staffed with at least four firefighters) stationed at the intersection of Harvest Ridge Road and James Farms Road. ROR p. 529 (Letter to Atty. Kubic from Deputy Fire Chief). The traffic studies revealed that the proposed development would cause significant

traffic safety issues including problems with the Police and Fire Departments entering and exiting the property, concerns with the grade of the exit, and an overall increase in traffic. ROR p. 276 (Zoning Commission Minutes). The Fire Department feared the project would cause traffic congestion that would delay emergency response to the area.

Other town departments expressed concerns that the increased traffic could require the town to widen James Farm Road to accommodate the additional travelers and/or require the town to install new traffic lights at nearby intersections to manage traffic flow. ROR p. 508 (Memo to J. Habansky Zoning Administrator from Maurice McCarthy Public Works Director). The three main intersections of concern are: 1. James Farm Road and Armstrong Road; 2. James Farm Road and Oronoque Lane; and 3. James Farm Road and Chapel Street. ROR p. 732 (Traffic Impact Study). It was mentioned that the congestion of this section of town is already such a significant concern that the Town is working with Sikorsky to move their entrance and widen the road to accommodate the congestion. ROR p. 633 (Public Hearing Transcript).

With the increased population living in the area after the completion of the 116-unit complex, additional cars, buses, and other vehicles will be crowding the streets and increasing the likelihood of accidents. Kermit Watt, Plaintiff's Traffic Engineer, proposed a traffic study suggesting at peak rush hour times, the increase of population would only add an additional 35 cars to the road. ROR p. 607 (Public Hearing Transcript). During the proposal, Commission members question the accuracy of the traffic study, wondering how 116 2-bedroom units would only produce an additional 35 vehicles during peak driving times. ROR p. 607 (Public Hearing Transcript). Assuming the 35 vehicle prediction was correct, the members also questioned the reasonableness of even a mere 35 additional vehicles on the already narrow "one lane road that barely two cars can get through." ROR p. 609 (Public Hearing Transcript). Further, when

questioned by the Commission of the tight driving area along a particular intersection, Mr. Watt admitted that the traffic study conducted is based on a general intersection and does not take into account that this particular intersection is especially narrow. ROR p. 610 (Public Hearing Transcript). The Stratford Police Department also expressed concerns with the narrowness of the intersection. In particular, the police were concerned with the probability of additional cars speeding along the narrow road. According to the traffic study, 94.72 percent of vehicles already speed down that road. ROR p. 633 (Public Hearing Transcript).

The increase in traffic, especially during peak rush-hour times, could be diminished if local buses agreed to provide additional stops or more frequent routes through James Farm Road. Having a usual, frequent bus route running up to the proposed development would theoretically help minimize the increase in traffic by providing alternate transportation. However, the Greater Bridgeport Transit District has expressed that they have no plans to expand their services on Route 23 or on Route 15 to accommodate the housing development on James Farm Road. ROR p. 505 (Letter to Atty. Kubic from Greater Bpt. Transit).

In addition to concerns posed by the Police, Fire, and other Town Departments, engineering expert Basulto determined the Applications as presented posed several violations of the International Building Code. Expert Basulto found the “proposed project does not provide accessible routes in accordance with” IBC Section 1104, nor does the project “show any accessible parking spaces” under Section 1106. ROR p. 290 (Engineer’s Report).

For all of these reasons, the Commission appropriately denied the Applications due to significant traffic safety concerns.

V. INCORPORATION BY REFERENCE

The Defendant Commission has reviewed the briefs of the Town of Stratford and Defendants Kurmay, Martinez, and Concerned Citizens Group of Stratford and incorporates by reference the positions and arguments set forth therein.

VI. CONCLUSION

Based on the foregoing, Defendant Town of Stratford Zoning Commission respectfully submits that its decision should be upheld and Plaintiff's appeal dismissed.

**THE DEFENDANT
TOWN OF STRATFORD
ZONING COMMISSION**

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Juris No. 10032

Exhibit A

2008 WL 544646

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

LANDMARK DEVELOPMENT GROUP et al.

v.

EAST LYME ZONING COMMISSION.

No. CV054002278.

|
Feb. 2, 2008.

Attorneys and Law Firms

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River/Hills.

Opinion

[PRESCOTT, J.](#)

***1** This affordable housing administrative appeal highlights the sometimes competing public policies of developing and maintaining affordable housing and preserving and protecting Connecticut's fragile natural resources. In this case, the public policy of encouraging the development of affordable housing must yield in light of the unique and important environmental setting of the property sought to be developed.

The appeal was brought by the plaintiffs, Landmark Development Group, LLC ("Landmark") and Jarvis of Cheshire, LLC ("Jarvis") (collectively, the "plaintiffs" or "applicants"), from a decision by the defendant, East Lyme Zoning Commission ("Commission"), denying their affordable housing application to construct 352 condominium units on a large tract of land in East Lyme that borders the Niantic River near Long Island Sound. Two hundred thirty-two of the proposed units would be market rate condominiums and 120 units would be

designated affordable housing rental units. Two intervening parties, Save the River, Save the Hills, Inc. and Friends of Oswegatchie Hills Nature Preserve, Inc. (hereinafter the "intervenor") also participated in these proceedings.

For the reasons set forth below, the court dismisses the plaintiffs' appeal.

I. FACTS AND PROCEDURAL HISTORY

This case has a lengthy and complicated procedural history.¹ The property involved in this appeal consists of approximately 236 acres of land in the Oswegatchie Hills area of East Lyme. The property is a steep, rocky and largely undeveloped expanse of land bordered by the Niantic River on the east; Interstate Route 95, Latimers Brook and residences on Calkins and River Roads to the north; residences and other large undeveloped tracts to the west; and Smith Cove, residences and other undeveloped portions of Oswegatchie Hills to the south. The property has scenic vistas of the Niantic River and of Long Island Sound. It is a rugged, hilly property with many mature trees and is one of the last undeveloped areas in the Town of East Lyme. A portion of the property is designated as "proposed open space" in the Town's Plan of Development. The property is located in a low-density, single-family residential zone, now requiring three-acre lots. Municipal water and sewer are not available to most of the site. There are no plans to extend such services to the property or surrounding area in the foreseeable future.

In December 2001, Landmark simultaneously applied for a text amendment to the East Lyme zoning regulations to create a new Section 32 in the zoning regulations titled "Affordable Housing District" and for a zone change of the property to a new "Affordable Housing District" (hereinafter collectively referred to as "Application I"). The regulations proposed by the plaintiffs in Application I would have permitted a maximum density of 10 units per acre, 50 percent lot coverage with no setbacks from waterways nor provision for open space. Application I proposed that the site be served by municipal water and sewer. Thirty percent of the dwelling units would be required to be deed restricted to ensure affordability. In addition, the plaintiff included an affordability plan in Application I to govern the administration of its commitment, as required by statute, to provide affordable housing on the property.

*2 Hearings on Application I were held in the Spring of 2002, during which the Commission considered testimony presented by the applicants and others including the town planner, planning consultants, state officials, the East Lyme Water and Sewer Commission, municipal officers, and concerned citizens and residents. It also considered reports and written statements.

On June 26, 2002, the Commission denied Application I. Notice of its decision was published in the *New London Day* on July 3, 2002. The Commission provided five principal reasons for its denial: (1) the proposal was not compatible with local and state plans of development for the area, which included protecting Oswegatchie Hills as open space; (2) the proposed dense development of the site was not feasible because of inadequate water and sewer capacity; (3) the development proposed could result in substantial damage to the ecosystem of Long Island Sound and the Niantic River; (4) similar damage could occur to Latimers Brook; and (5) traffic generated by the development could cause unsafe conditions for motorists and exceed current roadway capacity because of restricted access to the site.

Landmark did not appeal the Commission's June 26, 2002 decision. Instead, on July 17, 2002, Landmark amended its application to attempt to address the Commission's reasons for denying the initial application. The modified application, among other things, (1) reduced the maximum allowable density, (2) proposed onsite sewer and water (through community wells and septic systems) as an alternative to municipal water and sewer services, (3) added 100-foot setbacks from the potentially impacted waterways, (4) decreased the maximum lot coverage from 50 percent to 30 percent, and (5) set aside a minimum of 20 percent of the site as open space.

The Commission held additional public hearings of the revised application on September 19, 26 and 30, 2002. Additional evidence was presented by the applicant, the planning commission, intervenors and others.

On October 3, 2002, the Commission denied the revised application, concluding that the modifications did not satisfactorily resolve the fundamental, site-specific problems with the proposed development that it had previously found when it rejected the initial application. Notice of the Commission's decision was published on October 17, 2002.

On October 29, 2002, Landmark and Jarvis filed an appeal to the Superior Court from the Commission's decision denying the revised application for a proposed

amendment to the East Lyme zoning regulations and a zone change.

While that appeal was pending in the Superior Court, the plaintiffs filed, on May 12, 2004, a second application with the Commission (hereinafter "Application II"). The precise nature of Application II has been a point of vigorous dispute by the parties from the outset. The new application, at least by its terms, does not seek a text amendment to East Lyme's zoning regulations or any zone changes.² Instead, Application II seeks approval of a specific plan of development for the property. The plaintiffs characterize Application II as an affordable housing application brought pursuant [General Statutes § 8-30g](#). Application II seeks approval to construct 352 units of housing on one portion of the property. Two hundred thirty-two of the units are proposed as market rate condominiums, while 120 units are proposed as affordable housing rental units. The proposed development in Application II differed in some respects to the project originally outlined in Application I (as revised), presumably because the plaintiffs had attempted to address some of the ongoing concerns about the project that were expressed in the Commission's rejection of Application I (as revised). These changes are discussed at greater length below.

*3 The Commission treated Application II, despite protestations by the plaintiffs, as an application for a text amendment and zone change. Hearings were held by the Commission on Application II on August 5, 2004, August 19, 2004, September 2, 2004, November 4, 2004 and November 8, 2004.

On September 7, 2004, while the hearings on Application II were ongoing, the Superior Court, Quinn, J., dismissed the plaintiffs' appeal from the Commission's decision on Application I, concluding that substantial evidence in the record supported the Commission's decision. Specifically, Judge Quinn held that the Commission's decision was "based on the substantial public interests in preserving the Oswegatchie Hills area as open space, protection of the public's health due to the limited facilities for water and disposal of sewage, the adverse traffic conditions, protection of area waters from the fallout of dense development on the slopes and thin top soil of the area as well as protection of the Oswegatchie Hills' fragile ecosystem. The commission properly concluded that these public interests clearly outweighed the need for affordable housing at this location. Because the reasons are site-specific, there were no reasonable changes that could have been made to accommodate the other adversely impacted public interests found." *Landmark Development v. East Lyme Zoning Commission*, Superior Court, judicial

district of New Britain, Docket No. CV 02 05204475 (Sept. 7, 2004, Quinn, J.). Accordingly, Judge Quinn dismissed the plaintiffs' appeal from the Commission's decision regarding Application I. The plaintiffs subsequently sought certification to appeal from the Appellate Court, which was denied on November 17, 2004.

On January 6, 2005, the Commission denied Application II. Because the Commission treated Application II as including an application for a text amendment and a zone change, the Commission's decision is divided into three parts. First, the Commission concluded that any text amendment would be inadequate to protect the substantial public interests in health and safety and inadequate to promote affordable housing. Among other things, the Commission determined that the type of high density development contemplated by the application could only be supported by public water and sewer.

Second, the Commission concluded that the application for any zone change contravenes substantial public interests in health and safety. The Commission's principal reasons for its conclusion can be summarized as follows: (1) the proposal is incompatible with the local and state plan of development and the preservation of Oswegatchie Hills as open space; (2) the site is unsuitable for high-density multi-family housing because it (a) lacks infrastructure and capacity to provide adequate water and sewer, (b) has poor soil characteristics and (c) no motor vehicle access; (3) the proposal would adversely impact Long Island Sound, the Niantic River and surrounding woodland habitats; and (5) the affordable housing units are not comparable to the market-rate units.

*4 Finally, the Commission addressed the applicants' specific affordable housing plan. Recognizing that the proposed development need not be in strict compliance with East Lyme's existing zoning regulations, the Commission nevertheless concluded that the proposal must be denied for numerous reasons. These reasons included, by specific incorporation, each of the Commission's findings articulated in the portion of its decision denying a zone change. Additionally, the Commission concluded that the application does not comply with Section 32 of East Lyme's affordable housing regulations because it lacks necessary information required by the regulations. Accordingly, the Commission denied the applicants permission to proceed with its development plan. This appeal, brought pursuant to [General Statutes § 8-30g](#), followed.

Further findings are set forth below as necessary to address the claims of the parties.

II LEGAL ANALYSIS

A. Aggrievement and Jurisdiction

1. Aggrievement

"[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal ... It is [therefore] fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved." (Citation omitted; internal quotation marks omitted.) [Bongiorno Supermarket, Inc. v. Zoning Board of Appeals](#), 266 Conn. 531, 537-38, 833 A.2d 883 (2003).

An appeal brought pursuant to [§ 8-30g](#), challenging the denial of an affordable housing application, requires proof of aggrievement. [Trimar Equities, LLC v. Planning & Zoning Board](#), 66 Conn.App. 631, 638-39, 785 A.2d 619 (2001). Under [§ 8-30g](#), only an affordable housing applicant may initiate an appeal from the decision of a commission. [Ensign-Bickford Realty Corp. v. Zoning Commission of Simsbury](#), 245 Conn. 257, 267, 715 A.2d 701 (1998). It is well established that an owner of property that is the subject of the application is aggrieved. See, e.g., [Quarry Knoll II Corp. v. Planning & Zoning Commission](#), 256 Conn. 674, 703, 780 A.2d 1 (2001).

In this case, the parties stipulated, and the court finds proven, that both Landmark and Jarvis are the applicants and currently own the property. Accordingly, the plaintiffs are aggrieved.

2. Timeliness and Service of Process

Pursuant to [General Statutes § 8-8\(b\), \(f\), and \(g\)](#), an appeal shall be commenced by service of process within fifteen days from the date that the commission's notice of decision is published. It shall be commenced by leaving

two copies of the process with the clerk of the municipality. See [General Statutes §§ 8-8\(f\) and 52-57\(b\)\(5\)](#). Notice of the Commission's denial of Application II was originally published in the *New London Day* on January 13, 2005. The plaintiff served the Commission on January 27, by leaving two copies of the appeal papers with Karen M. Galbo, Assistant Town Clerk at the East Lyme Town Hall. (Sheriff's Return.) The appeal was filed with the clerk of the Superior Court at judicial district of New London on February 22, 2005. This appeal, therefore, is timely and the proper parties were served, pursuant to [§§ 8-8\(e\) and 8-30\(f\)](#).

3. Jurisdictional Challenges

*5 Before turning to the merits of this appeal, it is necessary to address a few preliminary issues that, according to the Commission and the intervenors, implicate the court's subject matter jurisdiction over this appeal and the Commission's authority to consider the application in the first instance.

a. The court has jurisdiction over this affordable housing appeal

Both the Commission and the intervenors claim that this court lacks subject matter jurisdiction over this appeal because the Commission lacked jurisdiction over the application filed by the plaintiffs in this appeal. This assertion is without merit.

The fundamental problem with the claim is that it improperly confounds the issue of this court's jurisdiction with the issue of the Commission's jurisdiction. This court's jurisdiction is derived from the Affordable Housing Land Use Appeal Statute, [General Statutes § 8-30g. Subsection \(f\) of § 8-30g](#) grants the Superior Court jurisdiction to review decisions of municipal agencies regarding affordable housing applications. An affordable housing application is defined as "any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing." [General Statutes § 8-30g\(2\)](#).

In this case, the Commission plainly denied an application made to it to develop land in East Lyme as affordable

housing. In fact, the decision issued by the Commission by its own terms recognizes that Landmark and Jarvis filed an affordable housing application for permission to develop affordable housing. Although the Commission and the intervenors may assert that the application filed by the plaintiffs did not comply with certain filing requirements, and thus did not properly invoke the jurisdiction of the Commission, the fundamental and undeniable fact is that Landmark and Jarvis filed an affordable housing application with the Commission. When the Commission denied that application, Landmark and Jarvis properly exercised their statutory right to seek judicial review from this court.

Accordingly, this court has subject matter jurisdiction to decide the issues in this appeal, including, but not limited to, whether the Commission had jurisdiction over the application filed by Landmark and Jarvis. As courts have often noted, an appellate tribunal has jurisdiction to decide whether the lower court or agency had jurisdiction to hear the case. See, e.g., [Long v. Zoning Commission](#), 133 Conn. 248, 249, 50 A.2d 172 (1946); [Ajadi v. Commissioner of Correction](#), 280 Conn. 514, 532-36, n. 22, 911 A.2d 712 (2006).

b. The Commission had jurisdiction to consider the application filed by Landmark and Jarvis

The Commission and the intervenors assert that the Commission lacked jurisdiction to consider Application II because it was not accompanied by, or "tethered to," an application for a(1) site plan, (2) special permit, (3) change in zone, or (4) text amendment. The Commission contends that because its jurisdiction is limited to considering only those specific types of applications, it could not consider the stand-alone affordable housing application filed by the plaintiffs. This claim is without merit.

*6 First, it is critical to recognize that affordable housing applications made pursuant to [§ 8-30g](#) are not made under the traditional land use statutory scheme. [Wisniewski v. Planning Commission](#), 37 Conn.App. 303, 317, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). A commission cannot deny an affordable housing application simply because the application does not conform to zoning regulations or that the development proposed violates the existing zoning scheme within the municipality. *Id.*, at 314, 655 A.2d 1146.

In *Wisniewski*, the Appellate Court recognized, in essence, that affordable housing applications are sui generis, and that whenever an affordable housing application seeks approval of a development that is not permitted by existing zoning regulations “a zone change will necessarily be embodied in the application, either as to use or as to bulk ... If no zone change were involved, there would be no need for an application for affordable housing ... No formal zone change application is needed because the act is designed to allow circumvention of the usual exhaustion of zoning remedies and to provide prompt judicial review of a denial for an application.” (Citation omitted.) *Id.*

In light of the Appellate Court’s decision in *Wisniewski* and the fact that the applicants had proposed an affordable housing development that did not conform to East Lyme’s existing zoning scheme, it is not surprising that the applicants chose not to file a site plan or special permit application. A site plan is a plan filed with a zoning commission to establish that the proposed use or development conforms to the municipality’s zoning regulations. *Connecticut Resources Recovery Authority v. Planning & Zoning Commission*, 46 Conn.App. 566, 570, 700 A.2d 67, cert. denied, 243 Conn. 935, 702 A.2d 640 (1997).³ Simply put, the applicants’ proposed development did not conform to existing zoning regulations. Therefore, a site plan application would not have been appropriate.

Similarly, “the basic rationale for the special permit is that while certain land uses may be generally compatible with the uses permitted as of right in a particular zoning district, their nature is such that their precise location and mode of operation must be individually regulated ...” *Irwin v. Planning and Zoning Commission*, 244 Conn. 619, 626, 711 A.2d 675 (1988). The activities and the uses proposed for the site were not among the special permit uses allowed by East Lyme’s zoning regulations. Consequently, an application for a special permit would not have been appropriate.

In reality, the application filed by the plaintiffs was an affordable housing application permitted by § 8-30g. Moreover, as *Wisniewski* suggests, the affordable housing application also contained an implicit request for a zone change as to use. Indeed, the Commission’s decision approached the application precisely that way by treating it as both a stand-alone affordable housing application and an implicit request for a zone change. Although the Commission cannot by its actions confer subject matter jurisdiction on itself, its own treatment of the application speaks volumes regarding the proper characterization of the application. Accordingly, the Court finds that the

Commission had subject matter jurisdiction over the application.

c. The applicants’ alleged failure to file a § 8-3(a) notice with the Town Clerk did not deprive the Commission of jurisdiction

*7 The final attack on the Commission’s jurisdiction is made by the intervenors alone.⁴ They contend that the applicants were obligated, pursuant to [General Statutes § 8-3\(a\)](#), to file with the Town Clerk a legal description of the land and related boundaries that is the subject of the application at least ten days prior to the commencement of the Commission’s public hearing in this case. The applicant’s failure to do so, the intervenors contend, deprived the Commission of jurisdiction to consider the application.⁵ The intervenors cannot prevail on this claim.

The intervenors did not raise this issue before the Commission. Their failure to do so, however, by itself, is not fatal. *City of Bridgeport v. Plan and Zoning Commission*, 277 Conn. 268, 275, 890 A.2d 540 (2006).

Instead, the intervenors raise the claim for the first time in this court. The record did not contain any evidence of the applicants’ compliance or lack of compliance with § 8-3(a). The intervenors therefore moved to present evidence to this court, pursuant to [General Statutes § 4-183\(i\)](#), regarding the issue of § 8-3(a) compliance. The court denied the motion. In addressing the intervenors’ claim, however, the court will assume, without finding, that the applicants did not file a legal description of the land and related boundaries with the Town Clerk.⁶

The flaw in the intervenors’ claim is that § 8-3(a) applies to applications for zone change. See *City of Bridgeport v. Plan and Zoning Commission*, *supra*, 277 Conn. at 276, 890 A.2d 540. The application here was an affordable housing application pursuant to § 8-30g. Although that application, if granted, may implicitly result in a zone change (at least as to use); see *Wisniewski v. Planning Commission*, *supra*, 37 Conn.App. at 314, 655 A.2d 1146; an affordable housing application may be a stand-alone application. “[N]o formal zone change application is needed because [§ 8-30g] is designed to allow circumvention of the usual exhaustion of zoning remedies.” *Id.*, at 315, 655 A.2d 1146. Because the application in this case was not, in a strict sense, a zone change application, the requirements of § 8-3(a) did not apply. Accordingly, any failure of the applicants to file a

legal description of the property with the Town Clerk did not deprive the Commission of jurisdiction.

4. Res Judicata and Collateral Estoppel Do Not Bar Judicial Review of the Application

Having addressed the challenges to subject matter jurisdiction of the court and the Commission, the court next turns to a special defense raised by the Commission. The Commission contends that the doctrines of res judicata and collateral estoppel bar judicial review of the Commission's decision to deny the affordable housing application. Specifically, the Commission contends that all of the issues in this appeal were fairly and fully litigated before Judge Quinn. In the Commission's view, Judge Quinn's 2004 decision upholding the Commission's denial of the zone change and text amendment application (Application I) prevents further judicial review of the Commission's subsequent decision denying Application II. The Commission cannot prevail on this claim.

*8 First, it is firmly established that the denial of one application by a zoning commission does not necessarily bar a party from filing a second, but related, application regarding the same property. See, e.g., *Vine v. Zoning Board of Appeals*, 102 Conn.App. 863, 869-70, 927 A.2d 958 (2007). "When a party files successive applications for the same property, a court makes two inquiries. The first is to determine whether the two applications seek the same relief. The zoning board determines that question in the first instance, and its decision may be overturned only if it has abused its discretion ... If the applications are essentially the same, the second inquiry is whether there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided ... For an appellate court, the only question is whether the trial court's finding as to the zoning board's decision is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Id.*, at 869-70, 927 A.2d 958.

In this case, the Commission appears to have concluded that the applicants were entitled to a second adjudication regarding the proposed development. Although the Commission took pains to characterize Application II as an application for a zone change and a text amendment (like Application I), it is clear that Application II sought explicit approval of a specific plan of development of affordable housing. Chairman Nickerson of the

Commission recognized this reality in stating: "We have to look at this separately. It's a separate application. And this Commission members are different and all that." (Exhibit VIII, p. 46.)

Application I did not seek approval for a specific plan of development. Instead, it sought approval of a zone change and text amendment to the zoning regulations that, if granted, would alter the existing zoning scheme under which a specific affordable housing development could then be proposed. Indeed, if the Commission had granted Application I for a zone change, then Landmark and Jarvis would have been obligated to file a second application that included a site plan showing that the proposed development conformed to the existing regulation, which, at that point, would have included the zone change. Moreover, the Commission itself in its decision treated Application II as containing a request for relief that was not sought in Application I. See Decision of Commission, January 6, 2005, Part C (Exhibit XIV).

Finally, the Connecticut Supreme Court has held that a zoning board "may grant a second application which has been substantially changed in such a manner as to obviate the objections raised against the original application ..." *Rocchi v. Zoning Board of Appeals*, 157 Conn. 106, 111, 248 A.2d 922 (1968). It is important to note that Application II included specific proposals that were not contained in Application I. For example, Application II included more detailed proposals for a community-based septic and on-site water system rather than reliance on the extension of Town water and sewers to serve the housing development. Application II provided increased erosion and sedimentation controls. In addition, Application II proposed fewer condominium units than would have been permitted if the Application I for a zone change had been granted. Finally, Application II sought to phase in development of the property at a different rate than was contemplated by Application I. (Exhibit 105.) These changes to the proposed development were at least sufficiently material for the Commission to decide, as it did, that the applicants were entitled to proceed to a public hearing and decision on Application II.⁷

*9 If the Commission believed that the applicants were not entitled to a "second bite at the apple" with respect to the project, the appropriate time to have made such a determination was when it was considering Application II, not on appeal to this court. If that had happened, this court would review that determination under an abuse of discretion standard. Because the Commission did not take that position but instead rendered a decision on an application that seeks different relief and contains material differences from a prior application, Judge

Quinn's decision reviewing Application I, does not bar this court from reviewing the Commission's decision regarding Application II.⁸ Accordingly, the court concludes that this appeal is not barred by the doctrines of res judicata or collateral estoppel.

B. Discussion

1. Preliminary Considerations

a. East Lyme is subject to the provisions of § 8-30g

The affordable housing procedures established by § 8-30g apply only if the property that is the subject of the application is located in a municipality in which less than 10 percent of dwelling units in the municipality meet the statutory criteria as affordable housing. [General Statutes § 8-30g\(k\)](#). The record is clear in this case that East Lyme has an undeniable need for additional affordable housing. Only 4.8 percent of East Lyme's housing stock qualifies as affordable and most of that serves as elderly housing. Accordingly, East Lyme is subject to the procedures of § 8-30g.

2. Standard of Review

Section 8-30g(g) and [River Bend Associates, Inc. v. Zoning Commission](#), 271 Conn. 1, 856 A.2d 973 (2004), set forth the standard for judicial review of an agency's decision regarding an affordable housing application. "The trial court must first determine whether the decision ... and the reasons cited for such decision are supported by sufficient evidence in the record. [General Statutes § 8-30g\(g\)](#). Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if the application is granted. If the [c]ourt finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the Commission's

decision was necessary to protect substantial interests in health, safety or other matters that the commission may legally consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) [River Bend Associates, Inc. v. Zoning Commission](#), *supra*, 271 Conn. at 26, 856 A.2d 973. The Commission bears the burden of persuading the trial court to uphold its decision. [General Statutes § 8-30g](#).

The cases make clear that the statute is remedial, and its purpose is to assist property owners in overcoming local zoning regulations that are exclusionary or provide no real opportunity to overcome arbitrary or local limits, and to eliminate unsupported reasons for denial. See [West Hartford Interfaith Coalition v. Town Council](#), 228 Conn. 498, 508-12, 636 A.2d 1342 (1994).

***10** The statute requires the Commission to state its reasons and analysis in a written decision. [Christian Activities Council, Congregational v. Town Council](#), 249 Conn. 566, 576, 735 A.2d 231 (1999). The Commission, in its denial resolution and its brief, must discuss, with references to the record, how each of its reasons for denial satisfies the criteria stated in the statute. See [Quarry Knoll II Corp. v. Planning & Zoning Commission](#), *supra*, 256 Conn. at 729-31, 780 A.2d 1.

The statute eliminates the traditional judicial deference to commission factual findings. Regarding the statutory criterion of a "substantial public interest in health or safety," the Commission must identify the type of harm that allegedly will result from approval of the application and the probability of that harm. See [Kaufman v. Zoning Commission](#), 232 Conn. 122, 156, 653 A.2d 798 (1995).

Finally, the statute requires the court to conduct an independent examination of the record and to make its own determination with respect to the second, third, and fourth criteria of subsection (g). See [Quarry Knoll II Corp. v. Planning & Zoning Commission](#), *supra*, 256 Conn. at 727, 780 A.2d 1. It is incumbent upon the Commission to first establish the correctness of its decision. If such a demonstration is made, it is then incumbent upon the court to conduct a plenary review pursuant to the last three prongs of the statute.

3. Review of Commission's Denial of Application II

In this case, the Commission made a number of detailed findings regarding the proposed development that can be summarized as follows: (1) the proposal is incompatible with the local and state plan of development and the preservation of Oswegatchie Hills as open space; (2) the site is unsuitable for high-density multi-family housing because it (a) lacks infrastructure and capacity to provide adequate water and sewer, (b) has poor soil characteristics and (c) no motor vehicle access; (3) the proposal would adversely impact Long Island Sound, the Niantic River and surrounding woodland habitats; (4) the affordable housing units are not comparable to the market-rate units; and (5) the application does not comply with Section 32 of East Lyme's affordable housing regulations because it lacks necessary information required by the regulations.

a. The record establishes that there is more than a mere theoretical possibility of a specific harm to the public interest if the application is granted

The court first examines "whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. at 26, 856 A.2d 973. In this case, the record establishes beyond reasonable dispute that the plaintiffs seek to develop a piece of property that includes and borders upon natural resources of significant value to both the residents of East Lyme and the State as a whole. The proposed development contemplates the construction of scores of condominium units that are within several hundred feet of the Niantic River. The Niantic River itself is part of the coastal resources of Long Island Sound, which "form an integrated natural estuarine ecosystem which is both unique and fragile." See *General Statutes* § 22a-91(1). The proposed development also contemplates significant development activity both within and adjacent to a coastal boundary, as defined in *General Statutes* § 22a-94. In addition, the property borders on Latimers Brook and contains significant areas of wetlands. There is also a long-standing public interest in preserving the Oswegatchie Hills area as open space.

*11 There is substantial and significant evidence in the record regarding more than a mere theoretical possibility of specific harm to these interests posed by the proposed development. For example, the record contains evidence that the development, even phased in as proposed in Application II, would cause increased nitrogen loading to

the Niantic River thereby adversely and significantly impacting eel grass growth, as well as shellfish and fish habitats. (Exhibit 24.) The record contains substantial evidence that the alterations to the site-including the construction of building structures, access roads, and septic systems-would significantly impact coastal resources, as well as water quality in both the Niantic River and Latimer Brook. The court cannot ignore this evidence or conclude that it raises only a theoretical possibility of harm. Finally, it is clear that the proposed development would severely impact the public interest in preserving this unique and important property as open space. Accordingly, the court concludes that the record establishes more than a theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if Application II is granted.

b. The reasons set forth by the Commission in denying Application II are legally and factually adequate

The court now must fully review the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the Commission legally may consider. Accordingly, the court turns to the specific reasons given by the Commission in its denial of Application II.

(i) Preservation of the property as open space

The first reason provided by the Commission was the significant public interest in preserving the property as open space. Judge Quinn addressed this issue at some length in her decision upholding the denial of Application I: "The [C]ommission concluded that the proposal was incompatible with the local and state plans of development for the area, which all sought to preserve and protect Oswegatchie Hills as open space. The record reflects a long history of efforts to preserve this area for such purposes beginning with the preparation of the comprehensive plan for the town in 1967. Some years later, in 1974, the Conservation Commission along with the Southeastern Connecticut Regional Planning Agency developed an open space acquisition plan including this area. In a 1977 report by the town's Land Use and Natural Resources Subcommittee of the Planning Commission,

the committee recommended that this area should be purchased outright by the Town or protected by easement against development. In 1987, the first selectman sought assistance from local state representatives to secure legislation and/or appropriations to preserve the areas. East Lyme's 1987 revision to its plan of development again lists the area as a target for preservation. The State legislature in 1987 designated the area as a 'Conservation Zone' and established the Niantic River Gateway Commission, which has as its purpose development of minimum standards to preserve the character of the area.

***12** "In 1990, the area was rezoned for lower density as a rural residential (RU-120) zone, requiring a three-acre minimum lot size. As true today as it was at that time, the first selectman wrote: 'If ever there was a place that nature never intended to be developed, the east slope of the Oswegatchie Hills is that place. Nowhere else is the land less suitable for construction, the natural resources on and adjacent to the land more susceptible to damage, and the public benefits to be gained from preservation greater.' Efforts to later change the zoning to require five-acre building lots failed, after a court determination that there was improper publication of the effective date of the zone change. *Wilson v. Zoning Commission*, 77 Conn.App. 525, 823 A.2d 405 (2003).

"In addition to local preservation efforts, there was also substantial evidence that the application was inconsistent with state and regional plans of development. The [Department of Environmental Protection] reported that the application was inconsistent with the Coastal Management Act, the Municipal Coastal Program and the Harbor Management Plan as well as with the Town of East Lyme Plan of Development. The Southeastern Connecticut Council of Governments stated that the zone change was inconsistent with the regional plan of conservation and development of 1997, which had classified the areas for low-density development and conservation. Area residents were opposed, with over 1700 signatures collected on various petitions to preserve the Oswegatchie Hills area." *Landmark Development v. East Lyme Zoning Commission*, *supra*, Superior Court, Docket No. CV 02 0520497.

In addition to the facts marshaled by Judge Quinn, the record in the present appeal contains evidence that demonstrates ongoing preservation efforts. For example, at the municipal level, the August 5, 2004, Planning Commission Report concluded that the proposed development continued to be inconsistent with the Plan of Conservation and Development. (R105 and Exhibit 21.) At the State level, the 2004-2009 Recommended Conservation and Development Plan issued by the

Intergovernmental Policy Division of the Office of Policy and Management concluded that the Oswegatchie Hill's area should be redesignated as a Conservation Area that would correspond and supplement the Niantic River Gateway Commission's Conservation Area (in which a large portion of the applicants' property already falls). (R31.)

The applicants contend, as they did in the prior appeal, that despite the availability of a one million dollar grant in state aid in 1987, the Town has never seen fit to acquire the land for preservation. In the applicants' view, the Town has instead attempted to so heavily regulate the property that it can achieve preservation of the land as open space without having to incur the costs to acquire it.

The court does not share the applicants' view for several reasons. First, there is no evidence in the record that this state financial assistance alone would have been sufficient to purchase the property, which undoubtedly remains highly valuable even if it can only be developed at a lower density than that proposed by the applicants here. Second, the applicants are, in essence, trying to morph a regulatory takings claim into an assertion that they are entitled, as a matter of law, to approval of this specific project.

***13** Moreover, as Judge Quinn concluded, the "lengthy history of preservation efforts alone make it apparent that the area has been under consideration for conservation due to its unique features for a long time. In addition, it is precisely some of the site's unique features, its fragile soils and rocky slopes as well as any development's impact upon the water resources which make it physically less suitable for dense development than other areas of the town." *Landmark Development v. East Lyme Zoning Commission*, *supra*, Superior Court, Docket No. CV 02 0520497. Although the Town may not have been able to muster the financial resources to acquire the property itself either through purchase or condemnation, that fact alone does not convert this unique and fragile property into an appropriate location for the type of high density development proposed by the applicants.

In *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 597, 735 A.2d 231 (1999), the Connecticut Supreme Court found that preservation of open space can, in the appropriate circumstance, constitute a substantial public interest that may outweigh the public interest in the creation of public housing. As with the conclusion in *Christian Activities Council* with respect to the property in that case, the court here concludes that State and Town interests in preserving Oswegatchie Hill, or significant portions thereof, has been

more than an idle or passing thought.

Finally, the applicants claim that its proposal to set aside approximately 20 percent of the property as open space would be a site-specific modification that is adequate to address and protect the public interests in open space. The court concludes, and the record supports,⁹ that this modification, which lacks any specifics in the record,¹⁰ is far from adequate to accommodate the very compelling public interest in preserving the property as open space. A 20 percent set-aside does not ameliorate the high density development of 80 percent of the property, nor adequately ensure the benefits from preservation and recreational that flow to the public if the property, or large portions thereof, are maintained as open space.

As a result, the court finds that the Commission has sustained its burden of proof that there are no modifications to this site-specific application (with the general density of development it proposes), that could accommodate the public interest in open space. The record supports the Commission's finding that the public interest in preserving the area as potential future open space outweighs the public interest in affordable housing, given the unique nature of the site.

(ii) The development is inconsistent with the policies and criteria of the Coastal Management Act

There is no dispute by the parties in this case, and the record is clear, that a significant portion of the property the applicants seek to develop lies within a coastal boundary. See [General Statutes § 22a-94\(b\)](#). In fact, the coastal boundary extends far beyond the 100-foot setbacks proposed by the applicants. Consequently, this appeal raises an important question regarding the applicability of the Coastal Management Act (the "CMA"), [General Statutes §§ 22a-90 through 22a-212](#), and its relationship to the affordable housing statute. The court is not aware of any decisions addressing the interplay between the affordable housing statute and the CMA. In fact, the attorney for the applicants, who has extensive experience in zoning cases, stated at oral argument that he is unaware of any instance in which an affordable housing application has been filed regarding property that falls, at least in part, within a coastal boundary.

***14** In enacting the CMA, the General Assembly made a series of legislative findings that indicate a significant

public policy in preserving and protecting the waters of Long Island Sound and its coastal resources. [General Statutes § 22a-91](#). These finding include:

(1) The waters of Long Island Sound and its coastal resources, including tidal rivers, streams and creeks, wetland and marshes, intertidal mudflats, beaches and dunes, bluffs and headlands, islands, rocky shorefronts and adjacent shorelands form an integrated natural estuarine ecosystem *which is both unique and fragile*.

(2) Development of Connecticut's coastal area has been extensive and has had a significant impact on Long Island Sound and its coastal resources.

(3) The coastal area represents an asset of great present and potential value to the economic well-being of the state, and there is a state interest in the effective management, beneficial use, protection and development of the coastal area ...

(5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development in suitable areas and by protecting those areas unsuited to development.

(6) *The key to improved public management of Connecticut's coastal area is coordination at all levels of government* and consideration by municipalities of the impact of development on coastal resources ... when preparing plans and regulations and reviewing municipal and private development proposals.

(7) Unplanned population growth and economic development in the coastal area have caused the loss of living marine resources, wildlife and nutrient-rich areas, have endangered other vital ecological systems and scarce resources.

(Emphasis added.) [General Statutes § 22a-91](#).

In light of these findings, it is a stated public policy:

"(1) To insure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting the natural environment or sound economic growth.

(2) To preserve and enhance coastal resources ...

(3) To coordinate the activities of public agencies to insure that state expenditures enhance development

while affording maximum protection to natural coastal resources and processes in a manner consistent with the state plan for conservation and development adopted pursuant to part I of chapter 297.

General Statutes § 22a-92.

The CMA expresses a strong preference for enhancing economic development and activities that are dependent upon proximity to the water and/or shorelands that are immediately adjacent to marine and tidal waters, while prohibiting or minimizing activities that are not marine dependent, particularly those that will adversely impact these fragile natural resources.

***15** Against the backdrop of these legislative findings, goals and policies, the General Assembly has mandated that municipalities specifically review zoning regulations, and changes thereto, that affect areas within the coastal boundary; see [General Statutes § 22a-104\(e\)](#); as well as site plans, plans and applications for activities and projects to be located fully or partially within the coastal boundary; see [General Statutes § 22a-105](#); for compliance and consistency with certain provisions of the CMA.

As a preliminary matter, the Commission and the intervenors appear to argue that the applicants were obligated to file a separate coastal site plan application along with their affordable housing application. The applicants argue that no separate coastal site plan application was necessary, but concede that the Commission was obligated to review their application for compliance with the CMA, at least for those portions of the property that fall within the coastal boundary. Specifically, the applicants contend that a separate coastal site plan application was not required because an affordable housing application is not within the enumerated list of proceedings in [§ 22a-105\(b\)](#)¹¹ that trigger coastal site plan review.

This court concludes that the applicants were not obligated to file a separate coastal site plan application in addition to the affordable housing application, but that the affordable housing application must contain sufficient information for the zoning authority to evaluate the development's compliance with the CMA. In *Fort Trumbull Conservancy v. Planning and Zoning Commission*, 266 Conn. 338, 348-60, 832 A.2d 611 (2003), the Connecticut Supreme Court addressed a similar question in deciding whether an application pursuant to [General Statutes § 8-24](#) for approval of certain municipal improvements required a separate coastal site plan application if the property falls within a coastal boundary. The Supreme Court concluded that no separate site plan application was required. "[A] coastal site plan

review under the act is to be conducted as part of the planning and zoning applications ... and not as a separate application or proceeding ... The act envisages a single review process, during which proposals for development within the coastal boundary will simultaneously be reviewed for compliance with local zoning requirements and for consistency with the policies of planned coastal management." (Internal quotation marks omitted.) *Fort Trumbull Conservancy v. Planning and Zoning Commission*, 266 Conn. 538-39.

It is true that affordable housing applications are not among the zoning commission proceedings that are explicitly denominated in [§ 22a-105\(b\)](#) as requiring coastal site plan approval. As discussed at length above, an affordable housing application seeking approval of a specific plan of development may not fall squarely within the traditional proceedings that are conducted by zoning commissions, particularly if the proposal does not conform to existing zoning regulations. See *Wisniewski v. Planning Commission*, *supra*, 37 Conn.App. at 317, 655 A.2d 1146. On the other hand, an affordable housing application will usually contain an implicit request for a zone change as to use, thereby implicating [§ 22a-104\(e\)](#), which requires that the zoning agency consider the criteria and policies of the CMA in its decision. In any event, given the critical public policies outlined by the CMA, it is inconceivable that the legislature would have intended that affordable housing projects be exempt from coastal site plan review, particularly since such affordable housing projects typically propose high-density development with the attendant environmental risks that such development entails.

***16** In its brief, the Commission contends that the applicants did not submit sufficient information to decide whether the project was consistent with the policies and criteria of the CMA. See [General Statutes §§ 22a-92 and 22a-102](#). Nevertheless, the Commission, as required by statute, notified the Department of Environmental Protection (the "DEP"), which made comments critical of the application. Despite the Commission's concern about the lack of information submitted by the applicants, the Commission ultimately concluded that the proposed development was inconsistent with the CMA. Accordingly, the court finds that the Commission had sufficient information to conduct the review required by the CMA.¹²

The Commission made specific findings, with citations to the record, regarding the manner in which the proposed development was inconsistent with the policies and criteria of the CMA. First, the Commission noted that many of the development's physical characteristics would

adversely impact coastal resources if the property was developed at the high-density rate proposed by the applicants. These characteristics included the site's steep slopes and bedrock soils in close proximity to the Niantic River; the necessity for clear cutting and blasting on the site; erosion and groundwater run-off into the Niantic River; and the fragile nature of many of the coastal resources and habitats within the coastal boundary. In addition, the Commission found that the proposed development did not adequately provide for future water-dependent uses and access for the public to future water dependent uses. Finally, it is obvious that a condominium development is not itself a water dependent use and is therefore not the type of development activity encouraged by the CMA.

These conclusions find substantial support in the record. The Commission considered extensive evidence from a variety of sources that support its findings regarding the steep topography of the land, the extensive bedrock at the site, the poor soil conditions, the likelihood of increased nitrogen loading to the Niantic River, the detrimental effect of high density development to shellfish habitats, and other adverse effects to coastal resources. The sources of this information included the Town's Planning Commission, a marine scientist, the Waterford East Lyme Shellfish Commission, a biology professor from Connecticut College, and interested citizens.

The applicants attack some of these evidentiary foundations by arguing that it presented contrary or better evidence. For example, the applicants contend that the only evidentiary basis for the conclusion regarding inadequate soils at the site is a county soil survey, which is not reliable evidence upon which the Commission could reasonably rely. This assertion is incorrect both legally and factually. First, evidence regarding the types of soils at the site came from a variety of sources, not just the county soil survey itself. The record is replete with information referring to the extensive presence of bedrock over significant portions of the site. This information was submitted by individuals, including those with expertise, who had performed field visits and actually walked the site. By way of example only, the DEP performed a field visit that revealed that throughout the property there was "till soils ... with very shallow depth to bedrock and exposed bedrock." In addition, a hydrogeologist hired by the Commission to review the proposal walked the site and noted that exposed bedrock was much more prevalent at the site than was reflected in the applicants' conceptual site plan. Although the applicants may have submitted evidence that it believes would support a contrary conclusion, the Commission can consider all of the reliable evidence in the record regarding the topography

and soil types at the site. The issue for this court is whether there is substantial evidence in the record to support the conclusion that the Commission reached, not whether the applicants submitted any evidence to the contrary.

***17** Engaging in the coordination between public agencies required by the CMA, the DEP extensively reviewed the proposal and its submissions to the Commission are of particular note. In a letter to the Commission, dated August 24, 2004, the DEP concluded that the proposed development is "inconsistent with the policies and standards of the [CMA] based upon severe development constraints at the site, the proposal's unacceptable adverse impacts to water quality and coastal resources, as well as inconsistency with ... the Town's Plan of Development, Municipal Coastal Program and Harbor Management Plan." The DEP also found that any reduction in "overall potential density" that had been proposed in Application II "will not significantly alleviate any of the potential adverse impacts to coastal resources, water quality, submerged aquatic vegetation, finfish, shellfish and wildlife on the Oswegatchie Hills site ... and in the Niantic River and Latimer Brook."

The DEP concluded that there would be "significant environmental consequences." The shallow depth to bedrock and steep slopes "would mandate significant alterations of the site to provide suitable land for road access, septic systems or water and sewer service and inhabited structures. Such alteration of this natural area and associated runoff would significantly impact coastal resources and water quality along the river ... [and] cause sedimentation and erosion, nitrogen loading and impacts on submerged aquatic vegetation, finfish, shellfish and wildlife on the site and in the Niantic River and Latimer Brook."

The DEP also noted that the 100-foot set back proposed in Application II would not ameliorate the significant environmental consequences of the development, in part because the setback applies only to residential units and does not include restrictions on clear cutting or other ground disturbances.

At the conclusion of its analysis, the DEP indicated that the information submitted by the applicants was incomplete at best. The DEP, however, provided an opportunity for the applicants to provide additional information about the proposal and to address its stated concerns. The DEP then met with the applicants and received additional information for its consideration.

The applicants, however, were unable to change the

DEP's position regarding the proposal and its inconsistency with the policies and criteria of the CMA. In a letter to the Commission dated September 29, 2004, the DEP indicated that the additional submissions were both incomplete and inadequate, and had done little to change the DEP's strongly held view that Application II is inconsistent with the CMA.

Stymied by the strength of this evidence and the DEP's strong opposition to the proposed development, the applicants argue that the DEP's submission is unreliable because the author of these letters did not personally appear at the public hearings. The applicants, however, did not take any steps to compel any DEP representative to appear at the hearing despite knowing that the letters had been admitted into the record and were quite damaging to its chances of receiving approval. See *Timber Trails v. Planning and Zoning Commission*, 99 Conn.App. 768, 780-81, 916 A.2d 99 (2007).

*18 The applicants conceded at oral argument to this court that the Commission could properly rely on this evidence, yet argue that the evidence should be entitled to little weight in this court's plenary review of the record. The court disagrees. If the applicants had wished to undermine the credentials of DEP employees, or the strength of the DEP's technical analysis of the proposal, they could have compelled DEP representatives to attend in order to cross-examine them on the relevant issues. This court can only infer that such testimony would not have been significantly helpful-and might even have been damaging-to the applicants' chances of success.

The court therefore concludes that there is substantial evidence in the record that the proposal is inconsistent with the criteria and policies of the CMA. The court also concludes that the applicants have received numerous opportunities to make site-specific modifications to the proposed development to address its lack of compliance with the CMA. It is clear to this court that such modifications are not possible in light of the specific nature of the site and the high-density development which is at the heart of the application. Finally, the court concludes, and the record supports, that the public interest in protecting the unique nature of the site, including, but not limited to, those portions within the coastal boundary, outweighs the public interest in affordable housing.

(iii) *The unavailability of water and sewer at the site*

The court next reviews the Commission's conclusion that denial of the application was warranted in light of the unavailability of water and sewer to service to the development at the high-density rates proposed by the plaintiffs. The court finds that the application was properly denied on this basis.

The applicants do not appear to dispute that a commission may properly reject an affordable housing application if the development proposed will have inadequate water and sewer facilities to serve the development. Obviously, there is a substantial and compelling public health and environmental interest in ensuring that a large, high-density development such as the one proposed here has adequate water and sewer services. Courts that have addressed this issue are in agreement with this fundamental fact. See, e.g., *Greene v. Ridgefield Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 90 0442131 (Jan. 6, 1993, Berger, J.) [8 Conn. L. Rptr. 137]; *D'Amato v. Orange Planning and Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 92 0506426 S (Feb. 5, 1993, Berger, J.) [10 Conn. L. Rptr. 444]; *Halter Estates Senior Community, LLC v. Bethany Planning and Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 06 4010191S (May 3, 2007, Schuman, J.).

At the outset, it is important to note that Judge Quinn thoroughly reviewed the adequacy of the sewer and water services in upholding the denial of Application I. Judge Quinn's thorough analysis of the issue bears repeating: "The first application filed by Landmark proposed that the development would be served by municipal sewer and water. The Commission found that the site lacked the infrastructure to provide such water supply and sewer capacity. The director of Public Works reported that the availability of such services was restricted. First, the town system did not extend to the site. Second, the town is under a consent order issued by the State Department of Environmental Protection that prevents extension of the water service area. While the town may submit a written request for extension, it must await the Commissioner's written decision prior to enacting any additional ordinances. In addition, when the town identified what areas of the town were to be sewered in 1985, this area was not in the sewer-shed boundary. In 1998, when the town prepared a capacity analysis of its system, it determined that all capacity was accounted for and any expansion would require no services to areas to which sewers were now committed. And although Landmark stated it could connect to the Boston Post Road extension, the Chairman of the Water and Sewer Commission testified that this was not correct. There is substantial

evidence in the record that municipal water and sewer service will not be extended to the property.

***19** “The commission determined that since such services were not available, this militated against the proposed zone change and the density of development the application envisioned. Indeed, in the town plan of conservation and development of 1999, a stated objective is that the town ‘should continue to provide for multi-family housing ... to meet a portion of the regional need for a variety of housing types available at affordable cost.’ It recommends that housing sites to be considered should generally be ‘free of major site development constraints such as wetlands, bedrock, steep slopes and primary aquifers and within the boundaries of or readily connected to the municipal water and sewer service area.’ Such site development constraints, the court concludes, with the exception of primary aquifers, are all present in the land that is the subject of this affordable housing application. Such development would be contrary to the town plan, as noted by the supervisory sanitary engineer for the water management bureau of the Department of Environmental Protection.

“In its modified application, Landmark in the alternative, proposed on-site water supply wells and sewer. The commission found that such systems are rarely allowed by the State Health Department or the Department of Environmental Protection, and only when there is clear evidence that such systems can be supported by the site and function properly ...” *Landmark Development v. East Lyme Zoning Commission*, *supra*, Superior Court, Docket No. CV 02 0520497.

With a few minor exceptions, the applicants have not modified the proposal that Judge Quinn reviewed, as it relates to the provision of water and sewer services. Instead, the applicants argue that Judge Quinn’s conclusions regarding this issue are fatally flawed because she relied upon two incorrect premises: (1) that the Town’s sewer shed does not extend to the property; and (2) the DEP rarely gives out permits for community septic systems. The applicants contend that the record with regard to Application II establishes that both of these facts are not true and, therefore, the Commission’s decision to deny the application on the basis of the unavailability of water and sewer at the site must be overturned.

Although the court agrees that the record here demonstrates that a portion of the property may be within the sewer shed, that fact alone does not undermine either Judge Quinn’s decision or the Commission’s decision regarding Application II. The Commission thoroughly

re-reviewed the question of the availability of municipal water and sewer at the site, including a consideration that a portion of the property falls within the sewer shed.

With respect to the issue of water service, the Commission considered the conclusions from the Director of Public Works that “[w]ater from the East Lyme system is not available to serve the site as proposed.” (Exhibit 59, 114.) The Commission also considered information that any additional purchases of water from New London were already allocated to an existing neighborhood not far from the applicants’ property. (Exhibit 59, 114.) The site also did not front on any existing water main and there is no existing infrastructure available to supply the site. Thus, the Commission properly concluded that the development would still lack appropriate access to available municipal water services.

***20** The Commission considered similar evidence regarding the availability of municipal sewer services at the site. First, the Commission heard evidence that while a portion of the property may be within the sewer shed, the majority of the property is not. Even with respect to the portion of the property that falls within the sewer shed, the provision of municipal sewer was problematic because the Town’s Facilities Plan designated that any sewerage from this area flow eastward to Waterford. The amount of sewerage that Waterford would accept is limited and already allocated to existing homes. Moreover, there was no sewer infrastructure available to the portion of the property within the sewer shed and the Town was not legally obligated to extend the sewer and necessary infrastructure to the applicants’ property. See *Avalon Bay Communities, Inc. v. Sewer Commission*, 270 Conn. 409, 43-32, 853 A.2d 497 (2004).

Importantly, the DEP was of the view that “the extension of sewers into [areas of the applicants’ property not within the sewer shed] to foster new development would likely be disapproved by [the] DEP, because such an extension would conflict with the state’s Plan of Conservation and Development ...” These facts, along with the fundamental reality that the majority of the property is not within the sewer shed, makes it significantly unlikely that municipal sewer services could ever adequately serve the property, particularly at the density proposed by the applicants.

The court now turns to the applicants’ claim that on-site wells and a community septic system would be adequate to serve the site. Specifically, the applicants contend that Judge Quinn’s decision is incorrect because she was under the misapprehension that the DEP rarely issues permits for community septic systems. Instead, the

applicants argue, onsite wells and a community septic system are feasible and that the Commission should grant the application and condition the grant on obtaining the necessary regulatory approvals for on-site wells and a community septic system. The applicants cannot prevail on this claim.

There is substantial evidence in the record demonstrating that it is highly unlikely that the applicants could obtain appropriate regulatory approvals for a community septic system. In addition, to the evidence discussed above regarding the soil types and steep slopes on the site, the Commission heard testimony specifically describing how these site characteristics would negatively affect and limit the potential for on-site waste water disposal. Installation of a community septic system would require blasting of bedrock that would in turn result in groundwater contamination. Groundwater contamination in turn would increase the potential for cross-contamination of on-site wells. A hydrogeologist explained that fractures in the bedrock, and the directions in which they run on the site, "could result in partially treated effluent with pathogenic bacteria getting into the fractures and contaminating either the on-site wells or offsite wells to the north." (Exhibit X, p. 136.)

*21 Approval by both the DEP and the Department of Public Health is necessary for a community septic system. In this case, there is substantial evidence that the DEP was highly unlikely to give the necessary approval. The DEP, in repeated correspondence with both the Commission and the applicants, expressed its concerns that major site development constraints exist at the site. Although the DEP repeatedly asked the applicants for additional information on this issue, there is nothing in the record to indicate that anything submitted by the applicants was sufficient to change the DEP's views on this subject, particularly in light of the fact that a portion of the property was within the coastal management zone. In fact, the DEP informed the applicant that it still had not provided the additional information sought, and that, in any event, the DEP did not "anticipate our overall comments and recommendations to the Commission to change given the overall site plan remains the same."

The applicants rely heavily on a statement in the record made by a DEP representative that "it is most likely that the proposed community system will require a lateral sand filter and a wastewater treatment plant to meet the Department's criteria for large scale on-site waste water systems." The applicants in their brief contend that this statement "can be reasonably regarded only as indication that on-site water disposal was possible, not impossible."

The court does not agree with the applicants' characterization of this statement. Taken in context, it is clear that DEP was trying to communicate to the applicant that the site plans it had reviewed depict only a more conventional septic system, which obviously was not adequate in light of the site's characteristics. Although the DEP did not and could not take the position that it would refuse to consider a significantly redesigned proposal, there is nothing in these statements that undermined the Commission's conclusion, based upon the extensive evidence in the record, that an on-site community septic system was extremely problematic, at best. (Exhibit 119.)

It is true that while the applicants have presented some evidence to dispute the conclusions of the Commission regarding Application II, as Judge Quinn correctly noted in reviewing Application I, the key question is whether there is substantial evidence in the record supporting the Commission's decision. As noted in *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 588, 628 A.2d 1286 (1993), "the possibility of deriving two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Just as Judge Quinn concluded that there was substantial evidence in the record to support the Commission's decision regarding Application I, this court concludes that the record regarding Application II supports the Commission's conclusion. The court also concludes that the public's interest in ensuring the adequate provision of water and sewer services in this instance clearly outweighs the need for affordable housing. Again, because of the site-specific nature of the application, there were no specific modifications that could be made to accommodate these public interests and provide affordable housing at this site.

III. CONCLUSION

*22 In *Mackowski v. Planning & Zoning Commission*, 59 Conn.App. 608, 757 A.2d 1162 (2000), citing *West Hartford Interfaith Coalition, Inc. v. Town Council*, *supra*, 228 Conn. at 513, 636 A.2d 1342, the Appellate Court stated that an agency's decision in "an affordable housing land use appeal, as in a traditional zoning appeal ... must be sustained if *even one* of the stated reasons is sufficient to support it." (Emphasis added.) As discussed above, the Commission properly denied Application II with respect to at least three reasons. It is therefore unnecessary to reach the remaining issue. The plaintiffs' appeal is therefore dismissed.

Judgment shall enter accordingly.

Not Reported in A.2d, 2008 WL 544646, 45 Conn. L. Rptr. 63

All Citations

Footnotes

- 1 Some of the procedural history has been adopted from *Landmark Development v. East Lyme Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 02 0520497 (Sep. 7, 2004, Quinn, J.).
- 2 Because Application II did not, in the Commission's view, contain a "site plan," the Commission decided to treat Application II as containing three parts: (1) an application for a text amendment to the zoning regulations; (2) an application for a zone change; and (3) an application for approval of an "Affordable Housing Development." Throughout this appeal, the plaintiffs dispute the Commission's characterization and treatment of Application II. The plaintiffs contend that Application II is best characterized as an application for a specific affordable housing plan and not necessarily as a resubmission of an application for a text amendment and zone change to the zoning regulations. As discussed later, the Court agrees with the plaintiffs that they were entitled to submit a stand-alone affordable housing application.
- 3 A site plan has been further described as "a physical plan showing the layout and design of a proposed use, including structures, parking areas and open space and their relation to adjacent uses and roads, and containing the information required by the zoning regulations for that use." *Connecticut Resources Recovery Authority v. Planning & Zoning Com'n*, *supra*, 46 Conn.App. at 566, 570, 700 A.2d 67.
- 4 The Commission does not agree with the intervenors' claim.
- 5 The intervenors again improperly confound this court's subject matter jurisdiction with the subject matter jurisdiction of the Commission. The court, therefore, treats this claim solely as an attack on the Commission's jurisdiction.
- 6 The record in this appeal does indicate that the application filed by Landmark and Jarvis was filed with the Town Clerk at least ten days before the public hearings commenced on the application. The application included an overall site plan (Drawing No. 0-1) as well as property boundary maps (B-1, B-2, and B-3). Although these plans and maps may or may not comply with the requirements of § 8-3(a); see *City of Bridgeport v. Plan and Zoning Comm'n*, *supra*, 277 Conn. at 276-80, 890 A.2d 540; the public had actual notice of the property that is the subject of the application.
- 7 It is true, as discussed later, that the differences in the proposal were not so substantial that the Commission was obligated to grant Application II. Nevertheless, it appears that the Commission viewed the changes as sufficiently material to warrant a second look.
- 8 On the other hand, it is also true that Judge Quinn's decision's need not be totally disregarded by this court. In reaching her decision, Judge Quinn analyzed a proposal that is quite similar to the present one. For example, Judge Quinn reached certain conclusions regarding the historical efforts to preserve the property as open space. That history has not changed from the time Application I was filed to time Application II was filed. Consequently, although the issues are not necessarily identical for collateral estoppel purposes, much of Judge Quinn's decision remains quite relevant.
- 9 See, e.g., ROR 104.
- 10 At oral argument, counsel for the applicants could not specify the manner in which 20 percent of the property would be preserved or how the public might have access to those portions of the property.
- 11 Section § 22a-105(b) provides in relevant part: "The following site plans and applications for activity or projects to be located fully or partially within the coastal boundary ... shall be defined as 'coastal site plans' and shall be subject to the requirements of this chapter: (1) site plans submitted to a zoning commission in accordance with section 22a-109; (2) plans submitted to a planning commission for subdivision or resubdivision in accordance with section 8-25 or with any special act; (3) applications for a special exception or special permit submitted to a planning commission, zoning commission or zoning board of appeals in

accordance with section 8-2 or with any special act; (4) applications for a variance submitted to a zoning board of appeals in accordance with subdivision (3) of section 8-6 or with any special act, and (5) a referral of a proposed municipal project to a planning commission in accordance with section 8-24 or with any special act.”

- ¹² The Commission also contends that the more deferential standard of review that applies in affordable housing appeals should not apply when reviewing the Commission’s determinations regarding whether the proposed development is consistent with the criteria and policies of the CMA. The court concludes that it is not necessary to reach this issue because even under the more rigorous standard of review required by [§ 8-30g](#) the Commission’s CMA analysis must be upheld.

2017 WL 3470742

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford at Hartford.

GARDEN HOMES MANAGEMENT CORP. et al.
v.
WESTPORT PLANNING AND ZONING
COMMISSION et al.

LNDCV166067291S

|
May 25, 2017

and January 28, 2016, and was closed on February 4, 2016. (ROR, Transcript [Tr.] 1–3.⁵) On February 4, 2016, the commission voted to deny the applications. (ROR, Item 139.) It published notice of the decision on February 12, 2016 in the *Westport News*. (ROR, Item 138.)

This appeal was commenced on February 29, 2016. On May 31, 2016, the plaintiffs requested to amend their complaint, which this court granted on June 2, 2016. On June 15, 2016, the commission filed an answer and special defense and the return of record. The plaintiffs filed an answer to the special defense on June 17, 2016. The commission filed its brief on August 9, 2016, McCartin filed his brief on August 15, 2016, and the plaintiffs filed their brief on September 22, 2016. The commission filed a brief in reply on October 13, 2016, and McCartin filed a brief in reply on October 14, 2016. The appeal was heard on January 31, 2017.

Berger, J.

I

*1 The plaintiff, Garden Homes Management Corporation (Garden homes), and the substituted plaintiff,¹ First Garden Development, Ltd. Partnership (First Garden), appeal from a decision of the defendant, the Westport planning and zoning commission (commission). In a letter dated February 9, 2016, the commission denied Garden Homes’ applications for a site plan and a coastal area management site plan for an affordable housing development under [General Statutes § 8–30g](#) at 122 Wilton Road in Westport. (Return of Record [ROR], Item 4; Item 139.) The codefendant, Joseph McCartin, undisputedly owns 146 Kings Highway North, which is apparently across the Saugatuck River from the proposed affordable housing development. (ROR, Item 89.) McCartin intervened in the administrative proceedings² pursuant to [General Statutes § 22a–19](#);³ (ROR, Item 89); and was named a defendant in the present action.

*2 Garden Homes sought to construct forty-eight housing units on its 1.16-acre parcel, currently zoned “AA”;⁴ (ROR, Item 147); with fifteen units set aside as income restricted. (ROR, Item 5, p. 36.) A public hearing was held on January 21, 2016, with a site visit on that date,

II

“Aggrievement is a threshold matter that implicates subject matter jurisdiction, and, therefore, whether raised by the parties or by the court sua sponte, it must be resolved before addressing claims raised on appeal ... It is axiomatic that [t]here is no absolute right of appeal to the courts from a decision of a [planning and zoning commission].” (Citation omitted; internal quotation marks omitted.) [Eureka V, LLC v. Planning & Zoning Commission](#), 139 Conn.App. 256, 266–67, 57 A.3d 372 (2012).

In the present case, the substituted plaintiff, First Garden, is aggrieved as the owner of the subject property. See [Handsome, Inc. v. Planning & Zoning Commission](#), 317 Conn. 515, 527, 119 A.3d 541 (2015) (“[i]t is well established that a part may be aggrieved for purposes of appeal by virtue of its status as a property owner”). As applicant for this affordable housing development, the coplaintiff, Garden Homes, is statutorily aggrieved by the denial of the application. [General Statutes § 8–30g\(f\)](#) (“[a]ny person whose affordable housing application is denied ... may appeal such decision pursuant to the procedures of this section ...”).

III

Review of an affordable housing appeal is governed by § 8-30g. Section 8-30g(g), in relevant part, provides: “Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reason cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development ... If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.”

*3 “[I]n conducting its review in an affordable housing appeal, the trial court must first determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record ... Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determined independently whether the commission’s decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development.” (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 26, 856 A.2d 973 (2004). “We continue to believe, however, that the statute does not impose on the commission a burden of proving facts as that concept is traditionally understood in the fact-finding context ... Rather, the burden imposed by § 8-30g(g)(1) is akin to the burden imposed on a party who seeks to have a statute declared unconstitutional, which is a legal determination ... This burden is met not by proving facts to a given level of certainty, but by presenting persuasive legal and policy arguments.” (Citations omitted.) *Id.*, 25 n.14.

“The foregoing determinations present mixed factual and legal determinations, the legal components of which are subject to plenary review ... [T]he planning and zoning commission remains the finder of fact and any facts found are subject to the ‘sufficient evidence’ standard of judicial review.” (Internal quotation marks omitted.) *Eureka V, LLC v. Planning & Zoning Commission, supra*, 139 Conn.App. 266. “The record must establish more than a mere possibility of harm to a substantial public interest ... The record must contain evidence as to a quantifiable probability that a specific harm will result if the application is granted ... Mere concerns alone do not amount to sufficient evidence to support the denial of an affordable housing application pursuant to § 8-30g(g).” (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc. v. Zoning Commission*, 130 Conn.App. 36, 58, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011).

IV

A

As a threshold matter, the commission argues and claims as its special defense that Garden Homes’ failure to submit the draft zoning regulations under § 8-30g(b)(1)(E) supports a denial of the application. Section 8-30g(b)(1)(E), in relevant part, provides: “Any person filing an affordable housing application with a commission shall submit, as part of the application, an affordability plan which shall include at least the following ... draft zoning regulations, conditions of approvals, deeds, restrictive covenants or lease provisions that will govern the affordable dwelling units.” The commission asserts that the failure to submit draft zoning regulations constitutes an incomplete application which supports its denial.⁶ Garden Homes counters that the phrase “draft zoning regulations, conditions of approvals, deeds, restrictive covenants or lease provisions that will govern the affordable dwelling units” should be read in the disjunctive, i.e., only one of the documents is required, not all of them. It asserts that the 2000 Report of the Blue Ribbon Commission to Study Affordable Housing which led to the adoption of what became § 8-30g(b)(1)(E) was not intended to require mandatory submission of draft regulations.

*4 “Where a zoning [commission] has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations ... The zone change must be sustained if even one of the stated reasons is sufficient to support it.” (Internal quotation marks omitted.) *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 513, 636 A.2d 1342 (1994); see also *Landworks Development, LLC v. Farmington Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-0505525-S (February 14, 2002, Eveleigh, J.) (“[w]hen the trial court reviews the Commission’s decision it only considers the collective reasons stated by the agency”). In the present case, the lack of draft zoning regulations was not one of the commission’s stated reasons for denial.⁷ Therefore, the court does not address this.⁸

B

*5 Garden Homes argues that only 3 percent of Westport’s housing stock meets the statutory definition of affordable. (ROR, Item 5, p. 67.) As the commission acknowledges that Westport has 313 units or 3.01 percent of its housing stock which meets the affordable criteria,⁹ (ROR, Item 61, p. 10; Item 96, p. 6); the exemption of § 8-30g(k)¹⁰ does not apply. Hence, this court will evaluate the commission’s denial of the applications under § 8-30g.

1.

A collective statement of reasons for the commission’s denial is required. *Brenmor Properties, LLC v. Planning & Zoning Commission*, 162 Conn.App. 678, 691, 136 A.3d 24 (“[§ 8-30g obligates a land use agency to make a collective statement of its reasons on the record when it denies an affordable housing land use application” [internal quotation marks omitted]), cert. granted on other grounds, 320 Conn. 9238, 133 A.3d 460 (2016). “[O]ur Supreme Court has cautioned against exalting ‘form over substance’ in contemplating the adequacy of such decisions ... Rather, we must recognize that the

commission is composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate ... We must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for *technical infirmities* in their actions ... Affording a degree of latitude is particularly appropriate in the context of affordable housing appeals, where—unlike traditional zoning appeals—the reviewing court is not empowered to scour the record in search of a proper basis for the agency’s decision.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.*, 692.

*6 Garden Homes argues that the commission’s letter of denial dated February 9, 2016; (ROR, Item 139); and the draft resolution should not be considered the commission’s collective statement of the reasons for denial. Garden Homes further asserts that the commission did not adopt the findings in the draft resolution; the denial expands on the action taken at the February 4, 2016 meeting and does not reflect what was actually voted upon by all members; and, before the commission’s vote, the commission was told that the draft motion to deny would be combined with comments from the deliberations. The commission counters that its draft resolution, which became its denial of the applications, is its collective statement.

As previously noted, the commission had to both finish the public hearing and deliberate and vote on February 4, 2016, in order to render the decision within sixty-five days. (ROR, Tr. 3, pp. 112–14, 153.) According to the transcript, draft decisions for both denial and approval had been prepared for the commission before the meeting. (ROR, Tr. 3, PP. 113, 117.) After inquiring whether there was a general agreement on an approval or denial, the commission discussed the draft denial decision going through the points that were restated in the February 9, 2016 letter. (ROR, Tr. 3, pp. 113–17; Item 139.) The commission identified the substantial public interests and then discussed whether they outweighed the need for the project and whether reasonable changes could be made. The reasons given were fire safety; (ROR, Tr. 3, pp. 117–26); public safety; (ROR, Tr. 3, pp. 126–34); and health and environmental issues. (ROR, Tr. 3, pp. 135–46.) For each reason during discussion about reasonable changes, the commissioners commented on Garden Homes’ refusal to provide more time to specifically consider this issue. (ROR, Tr. 3, pp. 126, 133–34, 146–48, 154–55.) The commission’s counsel, Ira Bloom, instructed the commission on the voting procedure—one that differed from its usual process because of the lack of time. He also indicated that the

discussion points would be memorialized in a letter to Garden Homes. (ROR, Tr. 3, p. 153.)

While the introductory portion of the denial letter describing the site is worded differently; (ROR, Item 139); the information is basically the same as the draft resolution, attached to Garden Homes' brief as exhibit C. Indeed, the discussion of the three substantial public interests is almost identical. Moreover, the draft resolution on page fourteen states, "For the reasons stated above, which the Commission adopts as a collective basis for its action, the Commission adopts the following Resolution." The resolution was read into the record before the commission voted. (ROR, Tr. 3, pp. 155–56.) Additionally, the letter of denial states, "[F]or the reasons stated above, which the Commission adopts as a collective basis for its action, the Commission, by unanimous vote (7–0), adopts the following Resolution." (ROR, Item 139, p. 12.)

The draft resolution and the letter of denial both address the concerns of fire safety, public safety and the environment. The record is clear that the commission discussed these three areas of concern, deemed them to be substantial public interests and put them to a vote. Thus, this court rejects the argument that the commission did not provide a collective statement of the reasons for denial in compliance with § 8–30g(g).

2.

a.

Under § 8–30g(g), the first issue is whether "the reasons cited for such decision are supported by sufficient evidence in the record ... Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc. v. Zoning Commission*, *supra*, 130 Conn.App. 48–49.

*7 In the present case, the 1.16-acre wooded parcel is located at the intersection of two state roads, Wilton Road and Kings Highway North; Post Road¹¹ is to the south.

(ROR, Item 139, p. 1.) The intersection of Wilton Road and Kings Highway North is several hundred feet west of the Kings Highway North Bridge, which is one of three bridges that crosses the Saugatuck River. (ROR, Item 61; Item 139, p. 1.)

The site steeply slopes down from Wilton Road and Kings Highway North to the Saugatuck River. (ROR, Item 65, p. 4;¹² Item 139, p. 2.) The easterly portion of the property, which is approximately one-fifth of the lot, consists of a tidal wetland of the Saugatuck River known as the Taylortown salt marsh.¹³ (ROR, Item 65, p. 3; Item 89, p. 10; Item 100.) The property slopes from an elevation of thirty-four feet at its western boundary to about six feet at the tidal wetland line. (ROR, Item 100.)

The five-story building would consist of thirty-nine one-bedroom units and nine two-bedroom units with seventy-one parking spaces beneath the units.¹⁴ (ROR, Item 139, p. 2.) Fifteen units would be affordable dwelling units. (ROR, Item 139, p. 2.) According to Westport's plan of conservation and development, the property is in a "Generalized Potential Housing Diversity Action Area." (ROR, Item 5, pp. 112–13.)

The commission identified three public interests that would be harmed by the granting of the application: (1) fire safety; (2) public safety concerning the uses of the bridges over the Saugatuck River; and (3) coastal resource preservation. (ROR, Item 139, pp. 3, 6, 8.) Each of the findings set forth the evidentiary basis and a determination. (ROR, Item 139, pp. 3–12.) Fire safety, public safety and coastal resource preservation have been identified as substantial public interests. See, e.g., *Landworks Development, LLC v. Planning & Zoning Commission*, *supra*, Superior Court, Docket No. CV–00–0505525–S ("The Commission stated reasons for its denial citing four substantial public interests which it found would be harmed by this application. These reasons were (1) traffic impacts and traffic circulation including traffic safety, (2) public safety, (3) unreasonable impairment to the public trust in natural resources pursuant to Section 22a–19 of the Connecticut General Statutes, and (4) environmental impacts. The Court must evaluate each reason individually, since any one valid reason is sufficient to justify the Commission's action").

b.

*8 The commission's third reason for denial of the

applications concerned the adverse impact the development would have on the tidal wetlands on the eastern portion of the property.¹⁵ Proffering sixteen findings, the commission found a substantial public interest in protecting the coastal resources that outweighs the need for this development and that the development would likely have “significant multiple negative impacts on the coastal resources, coastal habitat, ecosystems and waters” of the town and the state. (ROR, Item 139, p. 10.)

As to the first inquiry under § 8–30g(g), Garden Homes argues that this record lacks sufficient evidence of “more than a mere possibility of harm to” the wetlands. The record must establish “more than a mere possibility of harm to a substantial public interest” and “contain evidence as to a quantifiable probability that a specific harm will result if the application is granted.” *AvalonBay Communities, Inc. v. Zoning Commission, supra*, 130 Conn.App. 58. “‘[S]ufficient evidence’ in this context ... mean[s] less than a preponderance of the evidence, but more than a mere possibility ... [T]he zoning commission need not establish that the effects it sought to avoid by denying the application ‘are definite or more likely than not’ to occur, but that such evidence must establish more than a ‘mere possibility’ of such occurrence.” *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 585, 735 A.2d 231 (1999). “[T]he statute does not impose on the commission a burden of proving facts as that concept is traditionally understood in the fact-finding context ... Rather, the burden imposed by § 8–30g(g)(1) is akin to the burden imposed on a party who seeks to have a statute declared unconstitutional, which is a legal determination ... This burden is met not by proving facts to a given level of certainty, but by presenting persuasive legal and policy arguments.” (Citations omitted.) *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. 25 n.14.

The commission retained Jennifer O'Donnell, a civil engineer, and found her to be an expert in coastal resources and management. (ROR, Item 139, p. 9.) She testified that the main issue was the “proximity to the wetlands.” (ROR, Tr. 1, p. 55.) She further asserted that 92.4 percent of the upland area would be covered by impervious surface.¹⁶ (ROR, Tr. 1, p. 57.) In her opinion, this is simply too high a percentage so close to the wetlands especially with the existing soil types and steep slopes of 8 to 15 percent on the property which would reduce infiltration of the stormwater. (ROR, Tr. 1, pp. 57–59.) Specifically, she testified, “The runoff from the approximately 18,000 square feet of impervious, connected impervious coverage area, is going to be concentrated into a 12,500 square foot container. So the rainfall that’s currently hitting the slope is all going to be

concentrated in this one area. The water [is] going to flow quite quickly through the soil, and it’s going to go into the groundwater, it’s going to approach the wetlands. Wetlands are very sensitive to changes in fresh water, because we have a tidal wetlands. If we change the salinity of the area, we change the biology, we change the plants. We’re more likely to have invasive species.” (ROR, Tr. 1, p. 60.) The stormwater system, as designed, would channel all stormwater into two oil grit separators and then into four underground infiltration galleries—inaccessible for maintenance because they would be located under the buildings¹⁷—for storage and then less than seventy feet into the wetlands. (ROR, Item 65, p. 13.) O'Donnell reported that “[u]nderground infiltration systems should be located [ten feet] downgradient from foundation walls. The proposed location is upgradient from the foundation wall.” (ROR, Item 65, p. 12.) O'Donnell further indicated that the infiltration rate greatly exceeds the design guidelines and that the collected surface water will now be concentrated into the galleries for discharge. (ROR, Tr. 1, pp. 58–60.) She indicated that the runoff into the infiltration galleries “vastly chang[es] the ground water distribution and result[s] in a concentrated discharge to the down gradient tidal wetlands. Introduction of freshwater into tidal wetlands can alter the hydrologic, chemical and biologic composition of the wetlands, reducing its ecosystem services.” (ROR, Item 65, p. 12.) Furthermore, she stated, “No consideration of expected sea level rise and its impact on the proposed structure or the storm water management system is provided.” (ROR, Item 65, p. 16.)

*9 From her testimony, the commission found, among other things, that the stormwater discharge from the development would have a serious effect on the wetlands as it would allow increased pollution to flow into the tidal wetlands altering the “hydrological, chemical and biological composition of the wetlands.” (ROR, Item 139, p. 9.) Additionally, the commission found that the department of energy and environmental protection (DEEP) recommends that the buffer area between the buildings and the wetlands be 100 feet instead of the forty-five to sixty-five feet proposed. (ROR, Item 113; Item 139, p. 9.) Furthermore, Celia Cameron Martin representing the Aspetuck Land Trust, the owner of the marsh, testified about the critical importance of the marsh and the negative impact development would have on it. (ROR, Tr. 1, pp. 71–75.) Steven Danzer, a certified soil scientist and wetlands scientist, remarked that the Saugatuck River is currently rated SA, which is the highest water quality by DEEP where shellfish harvesting is now allowed, but that as recently as 2008 the river did not support harvesting for direct consumption of shellfish. (ROR, Tr. 1, pp. 130–31.)

Garden Homes points out, however, that Alicia Mozian, Westport's conservation director, issued a staff permit for the project. (ROR, Item 99, pp. 8, 24.) Additionally, Garden Homes' engineer, Steven Trinkaus, stated that the project would have no effect on the wetlands. (ROR, Item Tr. 2, pp. 52–53.) Nevertheless, the commission is not required to believe Garden Homes' experts. See *Kaufman v. Zoning Commission*, 232 Conn. 122, 156, 653 A.2d 798 (1995) (“the commission ... was not required to give credence to any witness, including an expert”). The commission has sustained its burden to show evidence in the record to support its decision not to believe Trinkaus. See *id.*, 157.

Based upon the record in the present case, the court holds that sufficient evidence exists to support the commission's finding that the proposed development would adversely affect the coastal resources. [General Statutes § 8–30g\(g\)](#). Additionally, protection of our environmental resources is unquestionably a substantial public interest. See, e.g., [General Statutes § 22a–91](#) (“The General Assembly finds that: (1) The waters of Long Island Sound and its coastal resources, including tidal rivers ... wetlands and marshes, intertidal mud flats ... form an integrated natural estuarine ecosystem which is both unique and fragile ... (3) The coastal area represents an asset of great present and potential value to the economic well-being of the state, and there is a state interest in effective management, beneficial use, protection and development of the coastal area ...”); [General Statutes § 22a–92\(b\)\(2\)](#) (“Policies concerning coastal land and water resources within the coastal boundary are ... (D) to manage intertidal flats so as to reserve their value as a nutrient source and reservoir, a healthy shellfish habitat and a valuable feeding area for invertebrates, fish and shore birds; to encourage the restoration and enhancement of integrated intertidal flats; to allow coastal uses that minimize change in the natural current flows, depth, slope, sedimentation, and nutrient storage function and to disallow uses that ... lead to significant despoliation of tidal flats; (E) to preserve tidal wetlands and to prevent the despoliation and destruction thereof in order to maintain their vital natural functions; to encourage the rehabilitation and restoration of degraded tidal wetlands ...”). The record supports the commission's findings that the risk of such detrimental environmental impact, as set forth in O'Donnell's testimony, outweighed the need for the fifteen units of affordable housing. See *River Bend Associates, Inc. v. Zoning Commission*, *supra*, 271 Conn. 26.

Inasmuch as Garden Homes did not submit a proposed modification pursuant to [§ 8–30g\(h\)](#) or allow further time

for discussion with the commission, it is impossible to determine whether the public interest could be protected by reasonable changes to the affordable housing development. In *Saddle Ridge Developers, LLC v. Easton Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV–11–6038949–S (January 25, 2016), this court stated, “As to whether the [public interest] could be protected by reasonable changes to the affordable housing development under [§ 8–30g\(g\)\(1\)\(C\)](#), the commission invited Saddle Ridge to submit a less intense application and the reduction of six units did not suffice ... The commission readily acknowledges in its decision ... and its brief that the public drinking supply can be protected by changes to the proposal. It suggests that Saddle Ridge return to its original plan of twenty-one units or submit another plan with one dwelling unit per two buildable acres. The evidence here supports limiting development to not more than one dwelling unit per two buildable acres and the commission does not seek an outright ban on development. This court cannot remand, however, the proposal to the commission with directions to approve a change to one unit per two buildable acres as this would not necessarily address other issues such as the proximity to the reservoirs, the stormwater system, and the amount of impervious pavers, among other things. More importantly, it would not address the actual or required changes that would have to be made to protect the public interest which requires a redesign of the development. In [§ 8–30g\(g\)\(1\)\(C\)](#), the legislature did not demand that a commission prove that the public interests could not be protected merely by ‘changes’ to the development; rather it centered on ‘reasonable changes’ to the development. It is impossible to know exactly what the changes for a project of this scale would be and whether they could be deemed reasonable. Indeed, the ability to submit a second or revised proposal under [§ 8–30g\(h\)](#) is precisely the vehicle to resolve this quandary. Here, Saddle Ridge only proposed a minimal change in its revised proposal that did not assist in answering the [§ 8–30g\(g\)\(1\)\(C\)](#) question of whether reasonable changes could be made ... This is obviously a substantial redesign and emphasizes why this court or the commission cannot be the developer, engineer, architect, environmental consultant, etc., to redesign Saddle Ridge's proposal: it is their project and many technical aspects require proper review. Historically, commissions have appropriately not been charged with that duty and for a variety of obvious reasons that holds true today. See *Shorehaven Golf Club, Inc. v. Water Resources Commission*, 146 Conn. 619, 625, 153 A.2d 444 (1959) (“[The plaintiffs] urged their plan as the only one feasible under all the circumstances. The commission denied it. The commission was not under a duty to make suggested changes”); *D’Amato v. Orange*

Plan & Zoning Commission, Superior Court, judicial district of Hartford, Docket No. CV-92-0506426-S (February 5, 1993, Berger, J.) [10 Conn. L. Rptr. 444]. Common sense cannot be ignored; see *State v. Brown*, 270 Conn. 330, 343, 869 A.2d 64 1224 (2005) [c]ommon sense does not take flight at the courthouse door' [internal quotation marks omitted]); and basic logic strongly suggests that a redesign order in this case would not and could not constitute a reasonable change. Accordingly, this court holds that the commission has met its burden in connection with § 8-30g(g)(1)(C)."

*10 In the present case, it is unknown whether a different configuration would resolve some or all of the commission's concerns. O'Donnell testified, "Given the site limitations, the large coverage area, the steepness of the site, the on-site wetlands, there are not a lot of alternatives here." (ROR, Tr. 1, pp. 57-59.) Further, the commission found "that there was insufficient evidence and time to determine if reasonable modifications could be made to this application to protect the matters of public interest set forth above. This Commission had previously approved this Property for construction of a single-family home over 7,000 square feet. Such a modification to the size and impact of the project could prove acceptable and avoid the serious consequences that will occur with the current application. Due to the Applicant's desire to rush through the public hearing process with a minimum amount of discussion, and due to the Applicant's steadfast refusal to grant any continuances for the public hearing, it is impossible for the Commission to opine on any other reasonable modifications, as only minimal time was allowed by Applicant to have any substantive discussion of changes to this Application." (ROR, Item 139, p. 11.) Similarly, in another part of the decision, the commission found "that the alternate plan offered by the applicant will not significantly decrease the negative impacts and that there are no reasonable changes to the development plan (other than, possibly, a significant reduction in the size and scope of the project) that would satisfy the public interest of protecting life and property. Due to the Applicant's refusal to allow additional time, no discussion as to reasonable changes was available and the Commission is without sufficient information to suggest reasonable modifications. Although it is possible that changes could be made to the proposed development that could address the public interests left unprotected by the proposal, it is not the Commission's function to redesign the project and the applicant neither provided any such changes nor agreed to give the Commission sufficient time and opportunity to suggest any such changes."¹⁸ (ROR, Item 139, p. 6.)

There was no change that could be made outside of a

redesign that would protect the substantial public interest. As in *Saddle Ridge Developers*, *supra*, Superior Court, Docket No. LND CV-11-6038949-S, "This is obviously a substantial redesign and emphasizes why this court or the commission cannot be the developer, engineer, architect, environmental consultant, etc., to redesign [the applicant's] proposal: it is their project and many technical aspects require proper review."

Beyond the commission not being obligated to redesign the proposal, it found that it was unable to discuss the reasonable changes due to Garden Homes' refusal to grant additional time. (ROR, Item 139, p. 11.) Here, we are confronted with the unfortunate decision by Garden Homes to leave the commission with no time to review and to discuss an application; see footnote 8 of this memorandum of decision; that did not provide sufficient information to satisfy legitimate and reasonable expert questions. For example, O'Donnell testified that "[t]he stormwater management plan did not give any of the indication of the pollution rates. That probably should have been included, because peak runoff analysis do not necessarily give an indication of the removal of pollution rates. This site in particular is going to have a high rate of pollution because of the impervious area and also the traffic ... Another problem with underground infiltration is we have limited experience with them ... This becomes critically important because we're putting it in an area that's not accessible ... So the thing to keep in mind is that the consequences of the failure of the system, a stormwater management system on the wetlands could be devastating." (ROR, Tr. 1, pp. 60-61.)

"[A]n applicant should not be permitted to refuse unilaterally to submit required information and then appeal in an attempt to force the town to prove that the information was necessary under the burden of switching mechanism of § 8-30g(g). It would be one thing to submit a complete application with the required analysis and have it indicate that there is no threat to public health and safety and then challenge the commission's decision based upon a lack of sufficient evidence; it is another thing to refuse to supply the information when requested." *Eppoliti Realty Co. v. Planning & Zoning Commission of Town of Ridgefield*, Superior Court land use litigation docket at Hartford, Docket No. LND CV-12-6038941-S (November 14, 2013, Berger, J.). Similarly, Garden Homes should not benefit from its refusal to allow thoughtful discussion and consideration by both parties to alleviate concerns. Again, while Garden Homes did submit an alternative plan, it was not under § 8-30g(d), i.e., one submitted in response to commission concerns. See *JPI Partners, LLC v. Planning & Zoning Board*, 259 Conn. 675, 692, 791 A.2d 552 (2002) ("[t]he resubmittal

procedure, unique to affordable housing applications, both supports the purpose of the statute to encourage and facilitate the development of much needed affordable housing and eliminates wasteful litigation and delay of such development by permitting an applicant effectively to address reasons for a denial at the administrative level”).

***11** Before this court on January 31, 2017, counsel for both the commission and for Garden Homes stated that, however this court decides, it should not order a remand. This court is fully aware of the importance of the affordable housing legislation and that § 8–30g is a remedial statute which “must be liberally construed in favor of those whom the legislature intended to benefit.” (Internal quotation marks omitted.) *Kaufman v. Zoning Commission, supra*, 232 Conn. 140. Yet, regardless of a particular town’s affordable housing inventory, certain substantial public interests may preclude reconsideration of a specific § 8–30g proposal. This is such a case. With

perhaps more cooperation and compromise, it might have been resolved favorably for both the developer and the community.

For the reasons stated herein, the court holds that the commission properly reviewed the environmental impact of Garden Homes’ proposal and denied the application under § 8–30g(g). “The zoning [commission’s] action must be sustained if even one of the stated reasons is sufficient to support it.”¹⁹ (Internal quotation marks omitted.) *Felsman v. Zoning Commission*, 31 Conn.App. 674, 678, 626 A.2d 825 (1993). Therefore, this court dismisses this appeal.

All Citations

Not Reported in A.3d, 2017 WL 3470742

Footnotes

- 1 Jacob Levi and Simha Levi were the owners of the subject property, 122 Wilton Road, as of November 13, 2015, the date when the applications were filed. (Pleading [Pl.] # 146.00, Exhibit [Exh.] A.) On April 25, 2016, they conveyed their interest to First Garden Development, Ltd. Partnership (First Garden). (Pl. # 133.00, Exh. A.) Garden Homes Development Corporation is the general partner of First Garden and Garden Homes Management Corporation filed the applications as agent for Garden Homes Development Corporation and First Garden. (Pl. # 133.00, Exh. A.) On June 17, 2016, First Garden moved to be substituted as party plaintiff for Jacob Levi and Simha Levi. The motion was granted on June 28, 2016.
- 2 McCartin’s petition to intervene, in relevant part, stated:
 - a. The proposal is anticipated to have a significant adverse and unnecessary impact via storm water discharge on the habitat, salt marsh, and estuarine embayment adjacent to the subject property due to insufficient storm water management.
 - i. These impacts include but are not limited to changes in ground water and surface water flows;
 - ii. Pollution caused by the location of the storm water infiltration structures within a structure and on steep slopes; and
 - iii. Pollution arising out of the storm water infiltration structure maintenance difficulties and possibility of failure.
 - b. The runoff from newly created impervious surfaces of nearly 18,000 square feet will vastly change the ground water distribution resulting in a concentrated discharge to the downgradient tidal wetlands;
 - c. Destruction, impairment or degrading of the Aspetuck Land Trust’s salt marsh ... (ROR, Item 89, pp. 1–2.)
- 3 Section 22a–19(a)(1), in relevant part, provides: “In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law ... any person ... may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.”
- 4 In 2007, the commission had approved plans for a 7000–square-foot single-family home on the property. (ROR, Item 139, p. 2.)
- 5 The transcripts of the public hearings will be referred to as Tr. 1 for January 21, 2016, Tr. 2 for January 28, 2016, and Tr. 3 for February 4, 2016, which is also a transcript of the commission’s deliberative session.
- 6 In *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. 6 n.2, the court noted in a different context, “When the plaintiffs submitted their application, there was no requirement that the plaintiffs obtain a zone change in order to obtain approval of their site plan ... In 2000, however, the legislature amended the statutes to require an affordable zoning applicant to submit draft zoning regulations in support of its application. See P.A. 00–206 § 1(b)(1)(E), now codified at § 8–30g(b)(1)(E). The zoning commission makes no claim that the provision is retroactive. Although the plaintiffs were not *required* to do so, the

commission makes no claim that the plaintiffs were not *entitled* to seek a zone change and to have the application considered by the commission under the standards set forth in [§ 8–30g\(g\)](#).” (Citation omitted; emphasis in original.)

7 The denial letter, dated February 9, 2016, does not mention the failure to submit such draft regulations. (ROR, Item 139.) Nevertheless, the first page of the draft denial memorandum, discussed at the February 4, 2016 meeting and attached to Garden Homes’ brief as exhibit C, states, in relevant part, “The Applicant did not seek amendments to the Westport Plan of Conservation and Development, the Westport Zoning Regulations, or the Westport Zoning Map as part of the Application. Such amendments, although not required, are often filed as part of a ... [§ 8–30g](#) application.”

8 The commission further asserts that the failure to submit the draft zoning regulations was a tactical decision to avoid a longer review period. The record is replete with the commission’s requests for more time and Garden Homes’ refusals to give more time to review these applications. (ROR, Tr. 1, p. 41; Tr. 2, pp. 30–31, 46–47, 107–09; Tr. 3, pp. 26, 83–84, 86; Item 85; Item 93; Item 139.) Garden Homes has refused to give extensions in other matters. See, e.g., *Garden Homes Management Corp. v. Planning & Zoning Commission of Town of Oxford*, Superior Court, land use docket at Hartford, Docket No. LND CV–14–6052002–S (July 23, 2015, Frazzini, J.) (“[p]rior to the end of the public hearing, members of the commission asked Garden Homes to agree to extend the sixty-five-day period for the commission to make its decision for an additional one or two weeks, but Garden Homes declined that request”). Indeed, during the public hearing in the present matter, Garden Homes’ counsel stated that his client had never given an extension of time in any of the affordable housing applications in which counsel had represented Garden Homes. (ROR, Tr. 2, p. 111.)

The commission’s argument highlights the intersection of the different time requirements of [General Statutes § 8–7d\(a\)](#) and [\(b\)](#), which in this case have been used as a sword by Garden Homes. As previously noted, Garden Homes’ applications were filed as a site plan and a coastal area management site plan. (ROR, Item 4.) Both the commission and Garden Homes treated this matter as an affordable housing appeal as does this court. See *Wisniewski v. Planning Commission*, 37 Conn.App. 303, 317, 655 A.2d 1146 (“[A]pplications that do not fit into the definition of an affordable housing application are not affected by [§ 8–30g](#). If an application does satisfy the definition of an affordable housing application, however, then the commission must satisfy the increased burden of proof in order to deny the application effectively.”), cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). Nevertheless, for coastal area management site plans, [General Statutes § 22a–109\(g\)](#) provides that “[t]he coastal site plan review required under this section shall be subject to the same statutory requirements as subsections (a) and (b) of section 8–7d for the purposes of determining the time limitations on the zoning commission in reaching a final decision.” [Section 8–7d\(b\)](#), in relevant part, provides that “[n]otwithstanding the provisions of subsection (a) of this section, whenever the approval of a site plan is the only requirement to be met or remaining to be met under the zoning regulations for any building, use or structure, a decision on an application for approval of such site plan shall be rendered not later than sixty-five days after receipt of such site plan ...” This sixty-five-day limit is much shorter than that found in [§ 8–7d\(a\)](#) which, in relevant part, provides: “In all matters wherein [an] ... application ... must be submitted to a zoning commission ... and a hearing is required or otherwise held on such ... application ... such hearing shall commence within sixty-five days after receipt of such ... application ... and shall be completed within thirty-five days after such hearing commences, unless a shorter period of time is required under this chapter ... All decisions on such matters shall be rendered not later than sixty-five days after completion of such hearing, unless a shorter period of time is required under this chapter ...”

In the present case, the application was received on December 3, 2015, and the decision had to be rendered no later than February 8, 2016, under [§ 8–7d\(b\)](#). If Garden Homes had submitted the draft regulations together with its applications, [§ 8–7d\(a\)](#) would have applied as [General Statutes § 8–3\(a\)](#) requires a public hearing to be held on all zoning regulations “in accordance with the provisions of [\[§ 8–7d\]](#).” The commission argues that the review was complex requiring evaluation under [§ 8–30g](#) and [22a–109](#). It also required the hiring of and review by its private consultants and by town officials along with the holding of the public hearing and its deliberations. Thus, the commission simply required more time to review and to consider the applications. (ROR, Tr. 3, pp. 150–51.)

Garden Homes did not oblige, however, and more time was not given to the commission. This affected the commission’s ability to decide the applications. For example, in the commission’s findings concerning fire safety, it concluded, “Due to the Applicant’s refusal to allow any additional time, no discussion as to reasonable changes was available and the Commission is without sufficient information to suggest reasonable modifications. Although it is possible that changes could be made to the proposed development that could address the public interests left unprotected by the proposal, it is not the Commission’s function to redesign the project and the applicant neither provided any such changes nor agree to give the Commission sufficient time and opportunity to suggest any such changes.” (ROR, Item 139, p. 6.) If Garden Homes had submitted the draft regulations pursuant to [§ 8–30g\(b\)\(1\)\(E\)](#), the commission would have had that additional time.

The court notes that a review of this record is representative of most [§ 8–30g](#) applications: they are complex and appropriate time is needed for proper review by these volunteer boards. Having presided over these types of cases for twenty-five years, this court is well aware of the myriad and the complexity of issues that arise in these appeals. For example, in *Autumn View v. East Haven Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV–13–6043869–S

(December 23, 2014), this court remanded the matter back to the commission for further review based upon a lack of information and the inability of both the applicant and the commission to respond to the technical information within the time requirements. Additionally, the sixty-five-day limit for coastal zone site plan applications is always reviewed under *existing* zoning regulations, and, if a commission fails to render a decision on a coastal site plan within the statutory time it is deemed rejected not automatically approved under [General Statutes § 22a-105\(f\)](#).

On the other hand, an affordable housing application is generally *not* governed by existing zoning regulations. Moreover, forcing a volunteer commission to decide an affordable housing application in sixty-five days without sufficient information likely does not produce the best planned project for the community. If this was a tactical decision by Garden Homes—and the record certainly supports that argument—it seems at best to be a certain waste of time for both the applicant which had spent significant time and money on its proposal and the commission which had inadequate time to review it. At worst, the failed tactic caused significant animosity between the applicant and the commission.

9 The commission argues that it has passed regulations promoting affordable housing and approved affordable housing projects. (ROR, Item 61, pp. 5–10.) Indeed, it sought to amend the record on October 26, 2016, to supplement a portion of its brief with information concerning recent actions it has taken after the administrative proceedings in the present case. Those latter actions are commendable, but are not relevant to this court’s review.

10 [General Statutes § 8-30g\(k\)](#), in relevant part, provides: “Notwithstanding the provisions of subsections (a) to (j), inclusive, of this section, the affordable housing appeals procedure established under this section shall not be available if the real property which is the subject of the application is located in a municipality in which at least ten percent of all dwelling units in the municipality are (1) assisted housing, or (2) currently financed by Connecticut Housing Finance Authority mortgages, or (3) subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as housing for which persons and families pay thirty percent or less of income, where such income is less than or equal to eighty percent of the median income, or (4) mobile manufactured homes located in mobile manufactured home parks or legally approved accessory apartments, which homes or apartments are subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as housing for which, for a period of not less than ten years, persons and families pay thirty percent or less of income, where such income is less than or equal to eighty percent of the median income ...”

11 These two intersections are apparently quite busy. (ROR, Tr. 1, pp. 43, 110.)

12 The pages of this record item are not continuously numbered and the item consists of a letter and a report titled “Environmental Review.” All references to this item number are to the pages of the report.

13 According to page eight of McCartin’s brief, “Applicant-appellant’s engineer describes the development site as ‘directly tributary to the West Branch of the Saugatuck River,’ (ROR [Item] 99, p. 87) meaning water from this site flows to the Saugatuck River. The Saugatuck River is an ‘estuarine embayment’ as defined by the State of Connecticut ([\[General Statutes\] § 22a-93\(7\)\(G\)](#); ROR [Item] 75, p. 5). Specifically it is an estuarine subtidal brackish water resource with an unconsolidated bottom (ROR [Item] 88, p. 2). It has rated water quality by the Connecticut Department of Energy and Environmental Protection (DEEP) at the higher level for coastal waters (SA) and is in excellent condition compared to adjacent similarly-sized tidal rivers in the area (ROR [Item] 75, pp. 5–6). It is a habitat for marine finfish, shellfish and other forms of aquatic life and wildlife (ROR [Item] 88, p. 2).” Nevertheless, Michael Klein, Garden Homes’ soil scientist, testified that DEEP’s coastal resource map does not identify the Saugatuck River as an estuarine embayment but is instead “a coastal river.” (ROR, Tr. 2, p. 69.)

14 Garden Homes also submitted a second set of plans for forty-five one-bedroom units and three two-bedroom units in a three-story, 41,689–square-foot building with fifteen units designated as affordable. (ROR, Item 139, p. 2; Tr. 1, p. 5.) In footnote 13 of Garden Homes’ brief, it argues that this alternative plan “is no longer economically viable” and that it would construct the “base plan” if this appeal is sustained. It reaffirmed this before the court on January 31, 2017. The alternative plan was not submitted to the commission as a modified plan under [§ 8-30g\(h\)](#).

15 The commission was also required to make determinations under [General Statutes § 22a-106](#). That section, in relevant part, provides:

(a) In addition to determining that the activity proposed in a coastal site plan satisfies other lawful criteria and conditions, a municipal board or commission reviewing a coastal site plan shall determine whether or not the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent development activities are acceptable.

(b) In determining the acceptability of potential adverse impacts of the proposed activity described in the coastal site plan on

both coastal resources and future water-dependent development opportunities a municipal board or commission shall: (1) Consider the characteristics of the site, including the location and condition of any of the coastal resources defined in [section 22a-93](#); (2) consider the potential effects, both beneficial and adverse, of the proposed activity on coastal resources and future water-dependent development opportunities; and (3) follow all applicable goals and policies stated in section 22a-92 and identify conflicts between that proposed activity and any goal or policy ...

- 16 Garden Homes' expert, Michael Klein, testified that the impervious surface would cover only 35.3 percent of site. According to footnote 15 of the commission's brief, Klein's 35.3 percent is based upon the whole site while O'Donnell's 92.4 percent is based upon only the area that could be developed, i.e., she excluded tidal wetlands and adjacent regulated area.
- 17 O'Donnell was concerned that regular maintenance would be required. (ROR, Item 65, p. 13.) Garden Home's engineer, Steven Trinkaus, asserted that the galleries were properly located under a parking surface, but that there was a building on top of the surface. (ROR, Item 99, p. 177.)
- 18 Similar findings were made by the commission in discussing the public safety. (ROR, Item 139, p. 7.)
- 19 As noted, the commission denied the application for two other public safety reasons: fire safety and traffic. In terms of fire safety, it cited twenty-two reasons for its conclusion that "there is a substantial public interest in the preservation of life and property by minimizing the threat from fire and similar catastrophes ... The Commission finds that based on the substantial evidence in the record ... the proposed housing development will result in significant and serious threats to the lives and safety of the residents of the proposed development. Such risk clearly outweighs the need for the additional affordable units." (ROR, Item 139, pp. 5-6.) Prominent among those reasons was the testimony of Fire Chief Andrew Kingsbury, who disputed the report from Garden Homes' expert, Joseph Versteeg. (ROR, Item 70; Item 135; Tr. 2, pp. 4-14.) Specifically, Kingsbury was concerned that the design of the buildings in light of the topography of the land would seriously impact fire fighting capabilities. (ROR, Tr. 2, pp. 11-13.) Kingsbury's concerns were evidently not rebutted by Versteeg. "[T]he commission ... was not required to give credence to any witness, including an expert." *Kaufman v. Zoning Commission*, *supra*, 232 Conn. 156. Further, the commission has sustained its burden to show evidence in the record to support its decision not to believe Versteeg. *Id.*, 157. Consistent with *River Bend Associates, Inc. v. Zoning Commission*, *supra*, 271 Conn. 26, the court would hold that sufficient evidence exists in "the record ... that there is more than a mere theoretical possibility ... of a specific harm to the public interest if the application is granted." Perhaps a different configuration would resolve some or all of Kingsbury's concerns; perhaps they would not. Such redesigns, in this case, must first be proposed by Garden Homes.

1996 WL 737495

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut.

ENSIGN-BICKFORD REALTY CORPORATION

v.

SIMSBURY ZONING COMMISSION

No. CV 940544054S.

|
Dec. 16, 1996.

Memorandum of Decision

MOTTOLESE, Judge.

*1 The plaintiff has appealed to this court pursuant to [Section 8-30g of the General Statutes](#) alleging that the Simsbury Zoning Commission acted illegally in denying its application for a change of zone which would permit the construction of 115 single-family detached dwelling units, of which 23 units would be deed restricted in accordance with [Sec. 8-30g\(a\)\(1\)\(B\)](#).

The property involved in the application consists of 138.75 acres of undeveloped land situated in the 1-2, General Industrial Zone.¹ To facilitate its development the plaintiff proposed that the zone classification be changed to R-15, an existing zone which permits single family detached dwellings on lots of 15,000 square feet.

This property is part of a 550-acre tract known as the "Powder Forest" which the plaintiff owns and which has been used for many years in connection with the plaintiff's business of manufacturing explosive devices. The property is located at the northeast corner of Stratton Brook Road (a town highway) and Bushy Hill Road (Route 167, a state highway).

The zone classifications adjacent to the site are predominantly R-40 single-family residential (40,000

square feet minimum lot size) on the south and west with a triangle of R-15 at the northwest corner and a pocket of business zone at the southwest corner. The northeasterly boundary is zoned general business and the southerly boundary is the remainder of the Powder Forest zoned 1-2 which contains the plaintiff's corporate headquarters as well as other general office uses.

At the consent of and in the presence of counsel and selected party representatives the court made a view of the site as well as accessible portions of the remainder of the Powder Forest. This inspection revealed the existence on the site of a former black gunpowder magazine which was evident from obvious signs of past soil disturbance. The record indicates that this magazine has not been used for a period of twelve to fifteen years. Approximately 380 feet from the easterly boundary of the site is another former storage area, the past use of which is not clearly identified. The record does however indicate that portions of the site were utilized by the plaintiff in the past in furtherance of its explosives manufacturing activities.

Further to the east on remaining land comprising the Powder Forest is what the record refers to as an "operations site." This installation consists of large piles of materials which are covered with black tar paper type material. While the record is silent on the point it was obvious from the view that the piled material was being held in storage for some future use or disposal. A drive through of some of the roadways which cross through the remainder of the Powder Forest revealed the existence of several small masonry buildings each of which was identified by a sign warning of the presence of explosives. In addition, it was noted that several of the areas in question were designated as "patrol areas."

AGGRIEVEMENT

*2 Based upon the testimony of Mr. Robert Stevens, manager of real estate development for Ensign-Bickford Realty Corp. and the deed to the property which is in evidence, the court finds that the plaintiff has been the uninterrupted owner of the premises at all times pertinent to these proceedings and thus the plaintiff is aggrieved. *Goldfeld v. Planning and Zoning Commission*, 3 Conn.App. 72 (1975).

THE ZONING COMMISSION'S REASONS.

The Commission has assigned six reasons for denying the application. They may be summarized as follows: (1) the environmental history of the site and of the land adjacent to the site where gunpowder had been stored, and an explosion occurred, required further environmental assessment which the applicant failed to provide; (2) the need to preserve the land for future industrial development; (3) the site is incompatible with the intended use.² "When a zoning commission has stated its reasons the reviewing court ought only to determine whether the assigned grounds are pertinent to the considerations which the authority was required to apply, and whether they are reasonably supported by the record." *First Hartford Realty Corporation v. Planning and Zoning Commission*, 165 Conn. 533, 543 (1973). The action of the commission should be sustained if even one of the stated reasons is sufficient to support it. *Zygmunt v. Planning and Zoning Commission*, 152 Conn. 550, 553 (1965). The key to the application of this test is whether any one reason is pertinent to the considerations which the zoning authority was required to apply. Unlike in conventional zoning appeals, the considerations which the authority is required to apply are not limited to Sec. 8-2. With the enactment of [Sec. 8-30g](#) the legislature has created a new set of considerations which zoning authorities must apply in affordable housing cases.

1. THE ENVIRONMENTAL CONCERNS.

The plaintiff complains that the commission's environmental concerns are speculative, generalized and unfounded. It claims that it provided sufficient assurance that no activities either active (manufacturing) or passive (storage) have taken place on the site over the past fourteen years. It has represented to the commission that its testing, manufacturing, storage and waste disposal operations have occurred adjacent to but well away from the site. The record shows that black gunpowder was stored on the site twelve to fifteen years ago. As stated above, the location of both the former and the current storage sites was apparent from a view of the site.

According to a study performed by the town engineer there is a bunker where explosive materials are stored that is located within 300 feet of the site. The location of this bunker is not discoverable in the record nor was it identified for the court on its view of the site. In addition, the operations center of the manufacturing enterprise is in the center of the Powder Forest which of course is adjacent to the site.

***3** In 1984, a gun powder explosion occurred within the operations area of the Powder Forest causing the death of an Ensign Bickford employee. As a result of that explosion the U.S. Dept. of Environmental Protection conducted an investigation of the Powder Forest and found evidence of (16) different hazardous substances underground.

Moreover, the applicant disclosed the existence of lead ground contamination on a portion of its plant site on the easterly side of Hopemeadow Street which borders the Powder Forest on the east. While the applicant represented to the commission that this condition would have no impact on the proposed development there is nothing in the record with respect to (a) possible similar contamination of the Powder Forest or, (b) whether there is any possibility that the contaminant could have leached underground from Hopemeadow Street to the subject site.

Recognizing the explosive nature of its manufactured product the applicant presented a letter to the commission advising it of its willingness to "relocate or scale back" some of its operations or storage facilities in order to comply with the distance requirements mandated by the Simsbury Fire Marshall for inhabitable buildings.

Each of these conditions caused the commission great consternation and concern and prompted it to inquire further into these subject matter areas. The record is replete with efforts on the part of the individual commissioners to obtain answers to questions propounded to the applicant's representatives concerning these environmental and safety issues. In each instance the applicant gave answers which were vague, incomplete and unsatisfactory to the commission. On numerous occasions the applicant indicated that [Sec.29-307a of the General Statutes](#) prevented it from disclosing to the commission information concerning the existence, location, nature or characteristics of the explosive material which is manufactured, tested and stored within the Powder Forest.

Additionally, duly authorized representatives of the applicant either could not or would not provide this information. The following colloquies taken from Exhibit 74 are typical:

Robert Stevens. (RS) Page 22

"The remaining area, which is about a hundred and seventy some acres ... in the center, it is currently used for some EB operations. There's also a building over here which was built ah, for Aerospace Company ... aerospace, that building is no longer used and we're in

the process of releasing that. There's a manufacturing building at this point, and then *there's some smaller operations that occur out of here and some storage facilities.*

MB: *Storage of what?*

RS: *Storage of our products ...*

MB: *Specifically such as-*

AB: Where's the nearest, where's the nearest ... (inaudible)?

AB: are there any explosive material?

RS: *I don't have that information.* (inaudible) we know that it's off the site that we're dealing with.

*4 MB: ... that photograph over here. Are there any active storage of bunkers in this vicinity right here? the materials? ... trying to ... where are all these ... things, all these ... around here?

JD: (FB atty Jeanne Delehanty) *I don't know what they are either* but first I don't know the date of the map. (Audience and commissioners talking and reviewing map) ... there's a variety of operations and storage facilities in this area for the

MB: (addressing audience) Could we just have a little quiet? If you want to talk, go outside and have a conversation out there, Thanks.

JD: for the manufacture of detonating devices. Ah, regarding the specifics, I don't know, and obviously they can change as, product comes in, product goes out.

MB: *Is there anybody here, in your company could come to us and talk to us about that activity? Your operations or whatever you call it?*

RS: *Well I think that what you're trying to get at is the safety component of the residential development,* ah, I think EB first of all, the fence that Mr. Stevens was describing would be putting 75 feet to the east of the zone change line that's shown on the plans think Mr. Stevens already mentioned there are no operations whatsoever, ah, at all

TW: there are operations in the ... (all talking at once)

MB: no, that's not the answer to the question

... but also environmental concern. I don't know if there are any environmental studies that have been done on

that property in question, but if there is indeed some storage of elements up there and there has been storage for years, the potential exists ah, on prior years particularly when there hasn't been a height of sensitivity ... environmental problems for some of that to have leached into the ground and spread into the site that we're considering here. I think we'd be derelict in our duty not to examine these issues. I'm not trying to give you guys a hard time. But I think they're real important.

BS: (Atty. Brian Smith) *I think that, ah, I think for a zone change application, especially this kind of zone change application, you have to consider whether there's public water, public sewer available.* Both of those, we got letters from the appropriate agencies stating that those are available. So you don't have the drinking well water issue, in any event. Ah, /and *secondarily you have traffic concerns,* I think ... be addressed because we have a full build out on industrial development, you're going to have more, far more traffic, if this is fully built up. *Other environmental concerns,* such as wetlands steep slopes, and that sort of thing, ... *addressed this, those issues with conservation commission, in fact they've given us a favorable referral,* so I think that, you know, that's from the environmental viewpoint, they need to examine that, and they did, they ... positively about that. When it becomes a site specific issue, ah, you know, we are-are here showing you, the plans, and we will also provide to you so ... can say that, you know, from EB what we're gonna be doing is gonna be safe for the community. I think that's what we ... for a zone change. (Emphasis added.)

*5 The above excerpts from the hearing transcripts demonstrate clearly that the commission was frustrated in its efforts to reach a reasonable level of satisfaction with its knowledge of the environmental risks, if any, which the development presented.

The applicant's entire effort to assuage the commission's concern consisted of its presentation to the commission at one of its hearings of a letter from the town fire marshall Kevin Kowalski (Ex.50d) and a letter from the manufacturing arm of the applicant (the Ensign Bickford Company) to the real estate arm of the applicant (Ensign-Bickford Realty Corp.) (Ex.44).³

The first of these documents invoke the confidentiality provisions of [Sec. 29-307a](#). That document also invokes regulations promulgated by the Commissioner of Public Safety pursuant to [Sec. 29-349 of the General Statutes](#) concerning the storage of gun powder magazines and mandating minimum distances between gun powder

magazines and "inhabitable buildings." The second document assures that the applicant will "relocate or scale back some of our operations or storage facilities ... to maintain full compliance with federal, state and local laws." The applicant plainly asks the commission to accept these two letters in full satisfaction of its legitimate concerns for public safety. The record reveals that the applicant offered no evidence to the commission in the form of expert testimony or otherwise as to the effectiveness or appropriateness of the "American Table of Distances" in protecting residents from harm from the plaintiff's operations. The commission is entitled, in the view of this court, to make its own independent determination with regard to this issue. It is not bound to accept the table of distances at face value. The commission had no basis for evaluating the propriety of these distances. The court therefore believes and so finds that there was sufficient evidence in the record in a negative sense to support the commission's determination that it was necessary to deny the application in order to protect substantial public interests in health and public safety.

The court believes that based upon its knowledge on the 1984 explosion and the 1985 findings of the U.S. Department of Environmental Protection with respect to hazardous underground substances, the admitted ground water contamination east of the site and the existence of former gun powder magazines on the site and as well as the current presence of gun powder manufacturing and storage on adjacent land of the applicant, the commission acted reasonably and appropriately in demanding that its questions be answered.

Section 29-307a(c) provides in pertinent part that "notwithstanding the provisions of Section 1-19 the local fire marshall, any firefighter, and municipal health director or any water company shall maintain the confidentiality of and not disclose such information to any person." The statute makes disclosure an infraction. The plaintiff takes the position that this statute precludes it from telling the commission anything more than it did. At the same time, the court has the distinct impression that the plaintiff believes that it has supplied all the information that the commission is entitled to. The court disagrees.

*6 While it is not a legitimate purpose of this proceeding to construe the meaning and scope of the above statutory language, the court notes that the class of persons whom the statute prohibits from disclosure is very specific and does not include the owner/applicant. Moreover, the court further notes that Sec. 1-18a(e) of the General Statutes, especially subsections (3) and (5) allows a public agency

such as the defendant commission to go into executive session under several discreet situations, one or more of which may be applicable here. The record is barren of any evidence of an attempt by either the applicant or the commission to treat this matter in executive session.

If the parties were uncertain of their ability either to disclose or to hold executive sessions they were free in advance of the hearing to petition the Freedom of Information Commission for a declaratory ruling under Sec. 4-176 or to initiate an action for a declaratory judgment for a ruling determining the exclusionary parameters of Sec. 29-307a(c).

A zoning commission, acting in its legislative capacity, is not limited to a consideration of conditions obtaining on a site which are definite or more likely than not to exist. A zoning commission is entitled to deny an application for a change of zone "where there is a *possibility* that approval of the application could result in environmental harm or physical injury to residents of the development as long as there is a reasonable basis in the record for concluding that its denial was necessary to protect the public interest. The record therefore must contain evidence concerning the potential harm that would result if the zone were changed ... and concerning the probability that such harm in fact would occur" *Kauffman v. Zoning Commission*, 232 Conn. 122, 156 (1995).

In this case, the following facts gleaned from the record constitute a reasonable basis for the commission to have concluded that its decision was necessary to protect the public interest: (i) past storage of gun powder on the site; (ii) active operations involving the manufacture and storage of gun powder on the applicant's adjacent property; (iii) ground water contamination east of the site; (iv) the 1984 explosion and the ensuing EPA investigation and findings; (v) the absence of evidence as opposed to representations as to each of the above. The court further finds that these concerns and the applicant's failure to address them are supported by sufficient evidence in the record and are necessary to protect the substantial public interest relating to health and safety. *Indian River Associates v. North Branford Planning and Zoning Commission*, 6 CONN.L.RPTR. 13, 372 (1992).

II. THE NEED TO PRESERVE THE LAND FOR FUTURE INDUSTRIAL DEVELOPMENT.

Primarily to enhance its property tax base, the defendant wishes to balance its predominantly residential community with controlled industrial uses. To accomplish

this it has placed roughly 743 acres in industrial zonal classifications. The site in question comprises about 20% of that total.

*7 The defendant argues that it has a substantial public interest in preserving this industrially classified land and that this public interest clearly outweighs the need for affordable housing.

The defendant relies heavily on Judge Berger's opinion in *United Progress, Inc. v. Borough of Stonington*, (CONN.L.RPTR. March 4, 1994). In that case the court held that Stonington had a substantial public interest in preserving the only industrially zoned site in the borough and that under the particular circumstances of that case, which do not apply here, the public interest outweighed the need for affordable housing. The Stonington case contains numerous distinctive characteristics which make both its result and rationale inapposite here.

On the other hand, the court recognizes that a municipality has a legitimate public interest in promoting economic and social diversity within its limits by classifying a portion or portions of the land within its boundaries as industrial. Sec. 8-2. It also has the right to attempt to enhance its grand list. However, the plaintiff points to nothing in the record to support its claim that "the preservation of industrially-zoned land is a legitimate reason for denying even an affordable housing application." Neither the record nor the defendant's brief offers any evidence or analysis that the public interest in preserving this land for industrial development outweighs the need for affordable housing.⁴

III. THE SITE IS FUNDAMENTALLY INCOMPATIBLE WITH THE USES PROPOSED.

The commission does not make clear what it means by "fundamental incompatibility". However, when read in conjunction with Reason Number 5 it becomes apparent

that the nature of the use i.e. residential, and not the size or design of the project is what is objectionable. In other words, the commission here is simply saying that the site is appropriately zoned 1-2 Industrial and should not be changed to residential. In *Wisniowsky v. Planning Commission*, 37 Conn.App. 303 (1995) the developer's affordable housing subdivision application was fundamentally incompatible with the applicable zoning regulations in that the proposed subdivision called for lot sizes ranging from 8,000 to 23,000 square feet whereas the applicable zoning regulations required minimum areas of 43,000 square feet. Affirming the trial court's reversal of the planning commission's denial of the subdivision application the Appellate Court held that "conformity (to zoning regulations) is not a mandatory prerequisite to approval of a subdivision application." The plaintiff construes the commission's findings of fundamental incompatibility as containing the implication that no matter what it did to modify the development the application would never meet with the commission's approval. The commission fails to bring to the court's attention any facts in the record which would render this site unacceptable for an affordable housing development under any circumstances. The court notes that the commission has failed to identify the characteristics of the site which would render it incompatible for use as an affordable housing development. Equally important is that implicit in such a universal determination is the principle that no amount of remediation (whether relating to environmental or traffic matters) can make the site compatible with the proposed use. There is no evidence in the record to support this conclusion.

*8 For the reasons set forth in I. above, the appeal is dismissed.

All Citations

Not Reported in A.2d, 1996 WL 737495

Footnotes

¹ The principal uses permitted in the 1-2 Zone are office buildings, research laboratories, warehouses and manufacturing.

² Both parties have treated the issue of traffic impact as if it were a reason which the commission articulated. While it is true that the six reasons refer to the preservation of the safety, health and welfare of the community, none of these reasons even by insinuation adverts to the issue of traffic. "Where a zoning commission has formally stated its reasons for its decision, the court should not go behind such collective statement to search the record for other reasons supporting the decision." *DeMaria v. Planning and Zoning Commission*, 159 Conn. 534, 541 (1970). Under Sec. 8-30g a zoning commission must be specific in giving its reasons in order to facilitate meaningful judicial review. *Pratt's Corner Partnership v. Southington*, 9 CONN.L.RPTR. 291, 293 (July 29, 1993). A generalized reference to the necessity to preserve health and safety based upon the commission's knowledge of

"the site and the environs of the site" cannot be translated into a reason predicated upon traffic safety or congestion. See, *Pratt's Corner Partnership v. Southington Planning and Zoning Commission, supra*.

3 At oral argument the plaintiff represented that both companies were under the same ownership and control.

4 The state certified affordable housing quotient for Simsbury is 1.65%.

2001 WL 1178638

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut.

AVALONBAY COMMUNITIES, INC.,
v.
WILTON PLANNING & ZONING COMMISSION.

No. CV000500917.

|
Sept. 6, 2001.

MEMORANDUM OF DECISION

MUNRO, J.

*1 Before the court is the plaintiff's February 4, 2000 appeal from the defendant Wilton Planning and Zoning Commission's (P & Z) denial of three applications filed by the plaintiff, AvalonBay Communities, Inc. (Avalon). Avalon brings its appeal pursuant to [General Statutes § 8-30g](#), the Affordable Housing Land Use Appeals Act.¹

I. PROCEDURAL HISTORY

Avalon commenced this appeal on January 27, 2000, by service of process (citation and appeal) upon Wilton's town clerk and on the chairperson for P & Z. On February 4, 2000, Avalon filed its appeal, with a February 29, 2000 return date, in the Superior Court, Judicial District of Stamford Norwalk at Stamford. On March 7, 2000, Avalon moved to transfer its appeal to the Superior Court, Judicial District of New Britain, tax and administrative appeals session. On March 8, 2000, the motion was granted by the court, Mintz, J. P & Z filed its answer and return of record on July 5, 2000. P & Z filed its brief on September 6, 2000 and Avalon filed its brief on November 1, 2000. P & Z filed a reply brief on December

8, 2000. The court heard argument on the appeal on May 11, 2001. A site visit was conducted on July 17, 2001.

II. FACTS

Avalon is a Maryland corporation with a place of business in Wilton, Connecticut. Avalon has a contract to purchase the subject property, 10.6 acres, known as 116 Danbury Road, Wilton, Connecticut. It is owned by James and Marilyn O'Halloran. The subject property is zoned R-1A (principal use is single family detached dwelling on lots of at least one acre). The subject property is bordered on the north by an eighteen unit multifamily residential development known as Wilton Hills, on the west by Route 7, and to the west of Route 7, by a variety of commercial and industrial uses.

In May 1999, Avalon submitted its applications to P & Z. Avalon's first application was to amend the Wilton zoning regulations by adding a § 29.5.E to the regulations establishing and regulating a housing opportunity development district (HODD). Avalon's second application was to rezone the subject property from the current R-1A zone to the proposed HODD zone. Avalon's third application is for site plan approval for a 119 unit development with 25% of the units set aside for affordable housing.

On May 26, 1999, Avalon filed its applications to amend the text of the zoning regulations, to rezone all 10.6 acres of the subject property from R-1A to HODD and for site plan approval for a 119 rental development on the subject property, with twenty-five percent of the units set aside for moderate income households. P & Z noticed and held public hearings on Avalon's applications on July 26, 1999, continued to September 13, 1999. At the July 26, 1999 public hearing approximately fifteen members of the public spoke against Avalon's applications; at the September 13, 1999 public hearing approximately thirteen members of the public spoke against the applications, one person who spoke was neutral and one person spoke for the applications. In support of the applications, the following persons spoke: Mark Forlenza, Senior Development Director for Avalon; John Scott of Scott Kenney Partners in Westport regarding housing market conditions in Wilton; Dave Schiff of Saccardi and Schiff regarding land use planning considerations; John Milone and Tom Sheil of Milone and McBroom regarding engineering, infrastructure and site planning; Timothy Pelton of Holdsworth Associates regarding emergency safety and access; and Alan Mess with Barkin and Mess

Associates regarding traffic.

*2 Wilton's planning and zoning officials offered comments on the applications, as did Michael Anderson from Fuss & O'Neill as engineering consultants for the town; John P. Thompson, an engineer who looked at the traffic and safety aspects of the proposals; David Portman from Frederick P. Clark Associates, Inc. who spoke about the parking and site layout for the town; a letter from the town's fire marshal; a letter from the Norwalk planning commission, who was asked to look at the proposals because the proposed development would tie into the Norwalk sewer system; and a report from the conservation commission.

P & Z rendered its decision to deny the applications on November 8, 1999 and these decisions were published in the *Wilton Bulletin* on November 11, 1999. P & Z set forth its findings and the reasons for its decision to deny each one of Avalon's applications.

On November 24, 1999, pursuant to General Statutes (Rev. to 1999) § 8-30g(d), Avalon modified its applications and resubmitted them to P & Z for review. The changes Avalon made in its resubmissions were to reduce the number of housing units from 119 to 113; to eliminate all regulated activities in the wetlands and watercourses; to convert to townhouse-type construction, thereby reducing site coverage to thirty-five percent; amended the HODD regulations to conform to existing regulations; to submit geotechnical engineering and soils analysis; and to reduce the entrance driveway from 1,100 feet to 440 feet.

P & Z noticed and held a public hearing on Avalon's resubmitted applications on December 8, 1999. At this hearing, members of the public spoke against the modified applications. Speaking in support of the modified applications on behalf of Avalon and in response to comments made by Wilton's consultants were Tom Sheil and John Milone from Milone and McBroom; Mark Forlenza of AvalonBay; Alan Mess with Barkin and Mess Associates; Ravindra Malviya, a geotechnical engineer from Barakos Landino who addressed slope disturbance and retaining walls; and Dave Schiff from Saccardi and Schiff. P & Z rendered its decision to deny the resubmitted applications on January 5, 2000 and these decisions were published in the *Wilton Bulletin* on January 13, 2000. P & Z set forth its findings and decision to deny each one of the resubmitted applications.

III. JURISDICTION

AGGRIEVEMENT

Under General Statutes (Rev. to 1999) § 8-30g(b), "[a]ny person whose affordable housing application is denied ... may appeal such decision pursuant to the procedures of this section." Thus, "under [General Statutes (Rev. to 1999)] § 8-30g(b), only an affordable housing applicant may initiate an appeal from a decision of a commission ..." *Ensign Bickford Realty Corp. v. Zoning Commission*, 245 Conn. 257, 267, 715 A.2d 701 (1998).

General Statutes (Rev. to 1999) § 8-30g(b) further provides that "[e]xcept as otherwise provided in this section, appeals involving an affordable housing application shall proceed in conformance with the provisions of said sections 8-8, 8-9, 8-28, 8-30, or 8-30a, as applicable." Thus, although § 8-30g does not directly state that proof of aggrievement is required, the reference to §§ 8-8, 8-9, 8-28, 8-30 and 8-30a satisfies the court that proof of aggrievement is required. *T & N Associates v. Town of New Milford Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. 492236 (November 10, 1999) (Holzberg, J.); *AvalonBay Communities, Inc. v. Orange Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. 492239 (August 13, 1999) (Munro, J.); *Vineyard Construction Management Corp. v. Town of Trumbull*, Superior Court, judicial district of New Britain, Docket No. 492251 (July 23, 1999) (Koletsky, J.); *D'Amato v. Orange Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 516355 (December 13, 1993) (Mottolese, J.) (10 Conn. L. Rptr. 444, 446).

*3 "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected ... We traditionally have applied the following two part test to determine whether aggrievement exists: (1) does the allegedly aggrieved party have a specific, personal and legal interest in the subject matter of a decision; and (2) has this interest been specially and injuriously affected by the decision." (Citations omitted; internal quotation marks omitted.) *Gladysz v. Planning & Zoning Commission*, 256 Conn. 249, 255-56 (2001). The plaintiff has the burden of pleading and proving aggrievement. *McNally v. Zoning Commission*, 225 Conn. 1, 6, 621 A.2d 279 (1993). In the present case, Avalon alleges aggrievement, claiming that it is a contract purchaser of the subject property and that it

is the proposed developer of housing with an affordable housing component. At the hearing on Avalon's appeal on May 11, 2001, the parties stipulated that Avalon has a contract with the O'Hallorans to purchase the subject property and that the O'Hallorans have owned the subject property continuously and without interruption from May 26, 1999, the date of Avalon's initial application to P & Z, to the date of the stipulation. Avalon's representative testified that Avalon entered into a one year contract with the O'Hallorans to purchase the subject property after a due diligence period in 1999, extended the contract for twelve months after the initial one year and extended the contract to purchase again in February 2001.²

"A contract purchaser of the property that is the subject of the application meets [the] two-part test [set forth in *Gladysz v. Planning & Zoning Commission*, *supra*, 256 Conn. 255-56] and has standing to appeal a decision on the application. See *Shapero v. Zoning Board*, 192 Conn. 367, 376-77, 472 A.2d 345 (1984); *R & R Pool & Home, Inc. v. Zoning Board of Appeals*, 43 Conn.App. 563, 569-70, 684 A.2d 1207 (1996)." *AvalonBay Communities, Inc. v. Orange Planning & Zoning Commission*, *supra*, Superior Court, Docket No. 492239. Thus, Avalon has pleaded and proved aggrievement by demonstrating that it is the contract purchaser of the property that is the subject of the affordable housing application. Accordingly, the court finds that during all times pertinent to these proceedings, Avalon has a valid contract to purchase the property from the owners, James and Marilyn O'Halloran, and is, therefore, aggrieved.

TIMELINESS AND SERVICE OF PROCESS

Avalon served process on Joan Maude Ventres, Wilton's town clerk, and on Thomas C. Gallagher, the chairperson of P & Z on January 27, 2000, which is less than fifteen days after notice of P & Z's denial of Avalon's resubmitted applications was published in the *Wilton Bulletin* on January 13, 2000.³ This appeal, therefore, is timely and the proper parties were served, pursuant to General Statutes (Rev. to 1999) §§ 8-8(b), (e), 8-30g(b).

*4 For appeals brought pursuant to General Statutes § 8-8, and, hence, § 8-30g, the citation is analogous to the writ used to commence a civil action and directs a proper officer to summon the agency whose decision is being appealed. See *Tolly v. Department of Human Resources*, 225 Conn. 13, 18-19, 621 A.2d 719 (1993); *Sheehan v. Zoning Commission*, 173 Conn. 408, 413, 378 A.2d 519

(1977) (citation is direction to officer to summon agency whose decision is being appealed). The file contains a proper citation.

IV. SCOPE/STANDARD OF JUDICIAL REVIEW

In its brief, P & Z argues that its burden of proof and the court's standard of review in an appeal brought under the statute is set forth in General Statutes (Rev. to 1999) § 8-30g(c)(1)(A-D).⁴ P & Z further argues that its decision on Avalon's applications and reasons cited to support the decisions satisfy the four-part test established in General Statutes (Rev. to 1999) § 8-30g(c). Avalon, on the other hand, argues that the affordable housing appeals statute was revised by the legislature, Public Acts 2000, No. 00-206, that the revision has a retroactive effect and thus, P & Z ignored the public act, thereby misstating and misapplying the statute to the record in its brief.⁵

P & Z argues that a planning and zoning commission acts in its legislative capacity when adopting new regulations or rezoning property, as was requested in the present case by Avalon in two of its three applications. See *Kaufman v. Zoning Commission*, 232 Conn. 122, 153, 653 A.2d 798 (1995) (where court found that "when the commission rejected the proposed amendment to its zoning map, the commission was acting in its legislative capacity"); *D & J Quarry Products, Inc. v. Planning & Zoning Commission*, 217 Conn. 447, 450, 585 A.2d 1227 (1991) (upholding the trial court's acknowledgment that the commission, acting in a legislative capacity, had broad authority to adopt the amendments to the zoning regulations). The Supreme Court further concluded that the appeals procedure under General Statutes § 8-30g applies to a commission's "legislative decision to grant or deny a zone change." *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 508, 636 A.2d 1342 (1994).⁶ Thus, § 8-30g applies to P & Z's denial of each one of Avalon's applications.

Avalon's argument regarding the recent enactment of P.A. 00-206⁷ raises a two-fold issue: whether the legislative change to General Statutes § 8-30g changes the traditional standard of review for the trial court of an affordable housing appeal and, if it changes the standard, whether the change should be applied retroactively in the present appeal.⁸ This issue was recently addressed by our Supreme Court in *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674 (2001), where the court found that the legislature, in enacting P.A. 00-206, now codified as the current version of General Statutes § 8-30g, changed subsection (c) (now subsection (g)) to

break “the review standards of the act into two separate sentences. The purpose is to clarify the difference between the sufficiency of the evidence standard in the first sentence and the weighing test in the second sentence, a matter which seems to have caused some concern as the result of a recent Supreme Court decision.” ... Thus, in an affordable housing application the court first determines whether the Commission has met its burden of proof that the decision is supported by sufficient evidence in the record. Having done this, *the court not the Commission*, then weighs whether the Commission has met its burden of proof, that the decision is necessary to protect substantial public interests which clearly outweigh the need for affordable housing and which cannot be protected by reasonable changes to the affordable housing development.” (Emphasis added.) 43 H.R. Proc., Pt. 14, 2000 Sess., p. 4644, remarks of Representative Patrick J. Flaherty.

*5 Thus, the court’s review on appeal is plenary, not de novo.¹⁰ See *Quarry Knoll II Corp. v. Planning & Zoning Commission*, *supra*, 256 Conn. 727 (“Under subparagraphs (B), (C) and (D) of [General Statutes (Rev. to 1999) § 8-30g(c)], however, the court must review the commission’s decision independently, based upon its own scrupulous examination of the record. Therefore, the proper scope of review regarding whether the commission has sustained its burden of proof ... requires the court, not to ascertain whether the commission’s decision is supported by sufficient evidence, but to conduct a plenary review of the record in order to make an independent determination on this issue”). Furthermore, P.A. 00-206, codified as the current version of § 8-30g, imposes an affirmative duty on the trial court to make an independent determination “whether the commission has sustained its burden of proof, namely that: its decision is based upon the protection of some substantial public interest; the public interest clearly outweighs the need for affordable housing; and there are no modifications that reasonably can be made to the application that would permit the application to be granted.” *Quarry Knoll II Corp. v. Planning & Zoning Commission*, *supra*, 256 Conn. 727.

Avalon further argues that, because the legislature meant to clarify the standard of review in the statute, it should be applied by the court retroactively. “Whether to apply [P.A. 00-206] retroactively or prospectively depends upon the intent of the legislature in enacting the statute ... In order to determine the legislative intent, we utilize well established rules of statutory construction ... Where an amendment is intended to clarify the original intent of an earlier statute, it necessarily has retroactive effect ... We generally look to the statutory language and the pertinent legislative history to ascertain whether the legislature

intended that the amendment be given retrospective effect.” (Internal quotation marks omitted.) *Oxford Tire Supply, Inc. v. Commissioner of Revenue Services*, 253 Conn. 683, 691-92, 755 A.2d 850 (2000).

Furthermore, “[i]n order to determine whether an act should be characterized as clarifying legislation [with attendant retroactive effect], we look to the legislative history to determine the legislative intent ... One factor we have deemed to be significant in determining the clarifying character of legislation is that the legislation was enacted in direct response to a judicial decision that the legislature deemed incorrect. (Citation omitted; internal quotation marks omitted.) *Department of Social Services v. Saunders*, 247 Conn. 686, 702, 724 A.2d 1093 (1999); see also *Quarry Knoll II Corp. v. Planning & Zoning Commission*, *supra*, 256 Conn. 722. Indeed, as the above legislative history in the present case shows, the change made to General Statutes (Rev. to 1999) § 8-30g(c) was meant to “clarify the difference between the sufficiency of the evidence standard in the first sentence and the weighing test in the second sentence, a matter which seems to have caused some concern as the result of a recent Supreme Court decision.” 43 H.R. Proc., Pt. 14, 2000 Sess., p. 4644, remarks of Representative Patrick J. Flaherty.

*6 Accordingly, “[t]he pertinent legislative history ... contains compelling evidence that the amendment [to General Statutes (Rev. to 1999) § 8-30g(c)] was intended to clarify, rather than to change, the original meaning of § 8-30g(c).” *Quarry Knoll II Corp. v. Planning & Zoning Commission*, *supra*, 256 Conn. 723.¹¹ “The legislature’s prompt and unambiguous response to this court’s decision in *Christian Activities Council* provides persuasive support for [the] contention that the legislature intended to clarify, rather than to change, the scope of our judicial review of a commission’s decision to deny an affordable housing land use application. Indeed, the foregoing analysis demonstrates clearly that the proponents of this amendment believed that, prior to our decision in *Christian Activities Council*, our scope of review had involved a two step process. Once those steps were blurred in *Christian Activities Council*, however, the legislature sought to restore the process.” *Id.*, 726.¹²

The Supreme Court concluded that “Public Act 00-206 appears to be a classic reaction to a judicial interpretation that was deemed inappropriate ... Once litigation brought that ambiguity to light, the legislature acted to remove any doubt about its earlier intentions ... The legislature has the power to make evident to us that it had always intended a more stringent scope of review in an affordable housing land use appeal. Therefore, we conclude that the

legislature intended P.A. 00-206, § 1(g), to be retroactive.” (Brackets omitted; citation omitted; internal quotation marks omitted.) *Id.*, 727-28.

The change made by the legislature to [General Statutes § 8-30g\(c\)](#), now codified as [§ 8-30g\(g\)](#), was to clarify the court’s standard of review of an affordable housing appeal brought pursuant to the statute, not to change the commission’s burden in its decision making about an affordable housing application, and the change to [§ 8-30g\(1\)\(g\)](#) is retroactive.

V. DISCUSSION

The commission stated reasons for its denial of Avalon’s original and modified applications for amending Wilton’s zoning regulations, to rezone the subject property and for site plan approval. The court must evaluate each reason individually, since any one valid reason is sufficient to justify the commission’s action. *Primerica v. Planning & Zoning Commission*, *supra*, 211 Conn. 96. However, because some of P & Z’s reasons for denying Avalon’s applications overlap, those reasons that are closely related will be analyzed together by the court.

No Relationship to Existing Zoning Regulations; Underlying Amendment to Zoning Map Not Adopted (Resolutions # 100-1REG; # 100-1MAP: Reasons 1 and 2; Resolution # 100-1MAP: Reason 7)

P & Z denied Avalon’s application to amend the zoning regulations, in part, because the proposed regulations do not bear any relationship to the existing zoning regulations and are not in conformance with the comprehensive plan. According to P & Z’s reasons for its denial, “the size of a structure, its setback requirements, separating distances, etc. are designed to be compatible within the zone itself and to the adjoining zones and character of the community. The applicant appears to have arbitrarily chosen one requirement from one zone and a second from another and has added requirements that do not meet the standards of Wilton’s Zoning Regulations. The applicant has acknowledged, and has failed to provide any justification for, differences in its proposed regulations with those of Wilton’s in areas that are vital to the protection of public health and safety including limitation of disturbance of slopes which affect

site stability, amount of regrading and the provision of sufficient number of parking spaces.”

*7 In its brief, P & Z argues that it adopted a plan of conservation and development, pursuant to [General Statutes § 8-23](#) and that this plan provides for a maximum density of ten units per acre and that this density is limited to Wilton center to “encourage the development of a diversity of housing types, including affordable housing, in locations accessible to shopping and services within a concentrated mixed-use core.”

This reason for denying Avalon’s applications is best characterized as a concern about intensification of land use or density. Such a concern about density fails to represent a compelling government interest to form a valid basis for P & Z’s denial of Avalon’s application to change the zone or rezone the subject property. The town plan cannot serve as a basis for denial of an affordable housing application. Our Supreme Court has held that “a town plan is merely advisory ... The purpose of the plan is to set forth the most desirable use of land and an overall plan for the town ... Because the overall objectives contained in the town plan must be implemented by the enactment of specific regulations, the plan itself can operate only as an interpretive tool.” (Citations omitted.) [Smith v. Zoning Board of Appeals](#), 227 Conn. 71, 87-88, 629 A.2d 1089, cert. denied, 510 U.S. 1164, 114 S.Ct. 1190, 127 L.Ed.2d 540 (1993).

If P & Z were allowed to deny any affordable housing application because the application exceeded the density called for by any other zone in the town, then it could “undermine [the] very important objective [of affordable housing]. Under [P & Z’s] proposed interpretation, a town could utilize zoning to impede a developer from appealing under the statute.” *West Hartford Interfaith Coalition v. Town Council*, *supra*, 228 Conn. 511.

P & Z further reasons that it cannot adopt a change of zone that is created by amendments to Wilton’s zoning regulations that have not been adopted by P & Z. This is not a valid reason for denying Avalon’s affordable housing applications. Denial of an affordable housing application because it fails to comply with a town’s zoning regulations subverts the intent of [General Statutes § 8-30g](#). See [Wisniewski v. Planning Commission](#), 37 Conn.App. 303, 317, 655 A.2d 1146, cert. denied 233 Conn. 909, 658 A.2d 981 (1995).¹³

P & Z cannot simply deny an application to amend its zoning regulations then deny an application to rezone the property to the amended zoning regulations, reasoning that the proposed rezone fails to comply with current

zoning regulations. “Our conclusion is that the plain and unambiguous language of § 8-30g does not contemplate a denial of an affordable housing subdivision application on the ground that it does not comply with the underlying zoning of an area.” *Wisniowski v. Planning Commission*, *supra*, 37 Conn.App. 312.

Comparison With Other High Density Developments;
Transitional Nature of the Area Surrounding the Property
(Resolution # 100-1MAP: Reasons 3 and 6)

*8 P & Z notes Avalon’s comparison of its proposed change to the zoning of the subject property to a sixty-five bed assisted living facility located on Route 7 (Danbury Road). Denying Avalon’s modified applications based on comparison with other high density developments is based on P & Z’s finding that the comparison made by Avalon is misplaced and misleading “due to the vast difference in traffic generation, number of people living at the site (65 versus 300), disturbance of the site and environmental impacts. Such density as proposed by [Avalon] is more appropriate in Wilton Center due to pedestrian access, location of retail stores, recreational facilities and public transit.”

In the Wilton zoning regulations, the purpose of the regulations governing multifamily residential districts is to “provide appropriate locations for a range of densities, and increase the availability of affordable housing in Wilton, where adequate facilities and services are present.” The regulations further require that “[a]ll residential developments shall be served by public sewer, public water supply; and fire protection systems to the specifications of the Fire Marshal.”

There are two concerns with P & Z’s denial of Avalon’s modified proposal to rezone its property to HODD on the basis that the density proposed by the project is more appropriately located in Wilton Center. Wilton’s current zoning regulations do not preclude developments with the density proposed by Avalon. In fact, for multifamily, residential developments, all the regulations require is access to public sewers, public water and fire protection systems that comply with specifications set forth by the town’s fire marshal. P & Z does not base its denial of Avalon’s modified proposal to rezone the subject property because the proposed zone fails to have access to public sewers, public water and fire protection.

Secondly, denying an affordable housing application

because it is not located near the center of a town is not and, given the intent of the legislature, cannot be a valid basis for denying the application. See *West Hartford Interfaith Coalition v. Town Council*, *supra*, 228 Conn. 510-11 (citing the legislative history of General Statutes (Rev. to 1993) § 8-30g where Representative William Cibes stated, in response to question about whether a zoning commission could deny a proposal to develop multifamily housing in a single family zone, that the “municipality might have very good grounds for not having multifamily dwellings in a particular area. The soil type, the capacity of the infrastructure, various reasons such as that might have been a reason for the municipality not to adopt a particular zone for that particular area, but per se, there would not be it would not [be] a reason for rejecting the application”).

While access to the services provided by a town’s center area is a logical goal for locating affordable housing in an area accessible to those services, P & Z failed to provide any evidence that this goal is necessary to protect the public health and safety. Furthermore, such a goal cannot clearly outweigh the need for affordable housing and would thwart the intent of the legislature in adopting General Statutes § 8-30g. This reason for denying Avalon’s modified proposal to rezone the subject property to HODD is not valid.

*9 In terms of the surrounding property, Avalon presented testimony by a consultant who reviewed the site plan in conjunction with the surrounding properties who said that Avalon’s proposed use of the subject property would create a transitional use compatible with surrounding properties. P & Z noted that “[s]uch an analysis ignores the reality of a low-density residential use of one acre zoning to the east and south of the property, and three units to the acre to the north of the property.” Again, this reason for denying Avalon’s modified proposal to rezone the subject property implicates P & Z’s concern with the density of the proposed development.

At the September 13, 1999 hearing on Avalon’s applications, David Schiff from Saccardi and Schiff, planning and development consultants, who spoke on behalf of Avalon’s applications, noted that the town plan identified the subject property as appropriate for higher density development and pointed out that there were a number of zones contiguous to the subject property that altered the character of the area from low density, single family development to a mixed use of commercial and higher density multifamily development.

Many of the residents who spoke at the hearing expressed their concerns about the density of the proposed

development and its incompatibility with the surrounding neighborhood. David Portman also reviewed the application for the town and surmised that the proposed development, at 11 units per acre, failed to provide a transition from the properties zoned commercial and the surrounding properties that are zoned DRD (three units per acre), single family cluster housing, and single family housing on the other two sides of the subject property.

As was stated earlier, a concern about density fails to represent a compelling government interest to form a valid basis for P & Z's denial of Avalon's application to change the zone or rezone the subject property. Furthermore, in considering an affordable housing application, while P & Z is justified in considering the affects of a proposal on surrounding property, if the proposal fails to raise substantial health and safety issues, P & Z is not justified in denying the affordable housing application because it does not "fit in" with the surrounding properties. See *TCR New Canaan, Inc. v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 389353 (April 5, 1992) (Berger, J.) (6 Conn. L. Rptr. 91) (where court noted that "[z]oning is not to be based upon a plebiscite of the neighbors. Their wishes are to be considered but the final ruling is to be governed by the basic consideration of the benefit or harm involved to the community at large ...").

Preservation of Trees; Inland Wetlands Commission Report (Resolution # 100-1Z: Reasons 1 and 12)

In its denial of both the original and the modified site plan for the subject property, P & Z expresses its concern with Avalon's "preservation of existing features of the site which are of value for the development or to the Town as a whole." P & Z's consultant found that, in Avalon's modified site plan, "the vast majority of the trees to be saved are within the wetlands regulated area or are on the boundaries of the property where they would be protected under wetland regulations or zoning setback and landscaping requirements." Furthermore, P & Z expressed its concern with the damage to the root systems of trees located in the center of the subject property caused by Avalon's development. Furthermore, even though Avalon proposed to move a "tot lot" from the courtyard area in its original proposal as a response to P & Z's prior stated concerns about recreational facilities on the site plan, P & Z found that the location to which Avalon proposed to move the "tot lot" would have an impact on trees that

Avalon was proposing to save in its modified site plan. Finally, although Avalon proposed a tree protection plan in its modified site plan, P & Z found this proposal ineffective because P & Z intended Avalon to accomplish the objective of preserving the trees and no assurances were made that a protection plan is feasible without substantial redesign of the site improvements.

***10** There is no evidence in the record, nor does P & Z attempt to suggest there is such evidence, that these concerns raise a substantial interest in public health, safety and related matters. Avalon modified its site plan to include a tree protection plan, which P & Z dismissed based on an unsubstantiated fear that the tree protection plan was not feasible. Such an unsubstantiated fear, however, cannot "rise to the level of sufficient evidence to sustain [P & Z's] burden of proof ..." *Rinaldi v. Suffield Zoning & Planning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 533603 (October 26, 1995) (Leheny, J). It is difficult to balance the need for affordable housing against an unsubstantiated concern about something that has not occurred and, with the proper assurances and requirements, may never occur. Thus, this reason for denying Avalon's site plan is invalid.

In denying Avalon's modified site plan, P & Z further states that it "considered the report of the Inland Wetlands Commission dated January 5, 2000 concerning inadequate information submitted at its public hearing concerning failure to address concerns regarding habitat impacts for wetlands species and elements of the proposed stormwater management system." P & Z fails to address how or why this reason constitutes a public health and safety issue that outweighs the need for affordable housing.¹⁴

The commission is bound by statute, however, to consider the inland wetlands commission's report in reviewing Avalon's modified site plan. [General Statutes § 8-3\(g\)](#).¹⁵ "The zoning commission must give the wetlands commission report due consideration. We do not read this as a statutory mandate that the zoning commission's decision be based on the wetlands report. To afford due consideration is to give such weight or significance to a particular factor as under the circumstances it seems to merit and this involves discretion." (Internal quotation marks omitted.) *Arway v. Bloom*, 29 Conn.App. 469, 479-80, 615 A.2d 1075 (1992), appeal dismissed, 227 Conn. 799, 633 A.2d 281 (1993). "[W]etlands are not protected solely through the simultaneous review provisions of [General Statutes § 8-3\(g\)](#). The Inland Wetlands and Watercourses Act, at [General Statutes § 22a-42a\(c\)](#), independently protects wetlands by requiring

that no regulated activity shall be conducted upon any wetland and watercourse without a permit.” (Internal quotation marks omitted.) *Read v. Planning & Zoning Commission*, 35 Conn.App. 317, 325, 646 A.2d 222 (1994).

In the present case, the commission had the report of the inland wetlands commission in which the inland wetlands commission denied Avalon’s permit application because of the proposed development’s impact on habitat for wetlands species and elements of the proposed stormwater management system. The commission, therefore, was aware that Avalon failed to obtain a permit to conduct a regulated activity upon any wetland or watercourse and could base its denial of Avalon’s applications on that basis.

Inadequate Parking Requirement; Parking for Bus Drop Off (Resolution # 100-1REG: Reasons 3 and 5; Resolution # 100-1Z: Reasons 6 and 14); Parking in CL & P Easement (Resolution # 100-1Z: Reason 7)

***11** In its original denial, P & Z expressed concern about the parking requirements in Avalon’s proposed regulation, which proposed two spaces per unit, but no visitor parking. In its modification, Avalon decreased the number of parking spaces per unit. P & Z denied Avalon’s proposed amendment to the zoning regulations on the basis that inadequate parking creates health and safety concerns as access will be blocked and internal circulation will be hazardous.

Wilton’s current zoning regulations require two parking spaces per dwelling unit plus one visitor space per two dwelling units for one, two and three bedroom multifamily dwelling units. At the December 8, 1999 hearing, Alan Mess, with Barkin and Mess Associates, addressed the modification to Avalon’s original application, stating that the site plan accompanying Avalon’s proposed amendment to Wilton’s zoning regulations would result in ninety-two garages and 123 open lot spaces for a total of 215 spaces, or a parking ratio of 1.9. Mr. Mess mentioned that the site plan included fifty-six tandem spaces (spaces in front of garages), which could be used by residents and visitors and, although they are not considered under either the current zoning regulations or Avalon’s proposed regulations, if these spaces were counted the parking ratio would be 2.40. Furthermore, Avalon’s representative gave P & Z examples of parking ratios at similar developments

throughout Connecticut and determined that 1.85 spaces per unit would be adequate.

There is no evidence in the record, let alone sufficient evidence, that P & Z attempted to counter Avalon’s evidence about the adequacy of the parking provisions in the modified proposal to amend the zoning regulations, nor is there evidence to demonstrate how 1.9 spaces per unit, versus the two spaces per dwelling unit under the current zoning regulations, creates a “hazard rising to the level of a substantial public interest.” *Mutual Housing Association v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 549155 (August 12, 1996) (Koletsy, J.). P & Z offered no evidence that the parking requirements contained in Avalon’s proposed amendment to Wilton’s zoning regulations would result in access being blocked and internal circulation being hazardous. “The commission’s expressions of opinion d[o] not ... rise to the level of sufficient evidence to sustain its burden of proof ...” *Rinaldi v. Suffield Zoning & Planning Commission*, *supra*, Superior Court, Docket No. 533603. Accordingly, inadequate parking as a reason for denying Avalon’s proposed amendment to Wilton’s zoning regulations is not valid.

Avalon’s proposed amendment to Wilton’s zoning regulations includes parking spaces that will be limited for use as drop off by parents of their children who ride the bus. In denying the modified application, P & Z takes issue with Avalon’s position that these spaces will be available for unrestricted use at times other than when needed for the bus drop off. The result is then that locating the parking spaces in the front yard setback if the spaces are limited to drop off parking is acceptable to P & Z, yet, because Avalon would make the spaces available for unrestricted use other than when needed for drop off, the violation of the front yard setback requirement is not acceptable and renders the proposed amendment to Wilton’s zoning regulations ineffective.

***12** In some ways, this reason is closely related to the reason stated for P & Z’s denial of Avalon’s modified proposed amendment to Wilton’s zoning regulations because of parking. P & Z takes issue with Avalon using the parking set aside for bus drop off in Avalon’s calculations of its parking ratio. In denying Avalon’s modified proposed amendment to the zoning regulations, P & Z fails to note that Avalon offered to add an additional three spaces to the bus drop off area and to post signage at the bus drop off area restricting parking during bus drop off periods in the morning and afternoon.

Members of P & Z opined during the hearing on the

modified proposal to amend the zoning regulations that, if the area were used for general parking, there was the possibility that someone would park in the area in the morning or afternoon when it was needed for bus pick up and drop off. This stated reason by the commission raises the substantial public interest in the safety of children waiting in the bus drop off area to go to school. While the concern with the parking in the area is somewhat speculative, as is more fully discussed above, when this concern is combined with the safety issue of the slope cuts needed for the single access driveway into the development and the traffic concerns to and from Route 7, as is more fully discussed below, the substantial interest in public safety becomes more salient. Therefore, the court finds that, in denying Avalon's application because of the safety related to the bus drop off area and related parking, combined with other issues that impact these identified safety concerns, the commission identified a substantial concern with public safety that outweighs the need for this affordable housing development.

As for Avalon's site plan, in both the original and modified applications, P & Z found the proposed parking to be inadequate. In denying Avalon's site plan applications, P & Z expressed its concern for the safety hazard created by the inadequate parking for children, residents and visitors. Further, P & Z found that the "site plan does not comply with Wilton's Zoning Regulations or the applicant's proposed regulations in that the spaces dedicated to the bus drop-off are counted as unrestricted parking spaces towards the parking requirements," resulting in a further reduction of parking spaces.

P & Z notes that, at the public hearing on the modified proposed site plan, Avalon offered three additional parking spaces in the bus drop off area, but that there were conflicting projections of the number of children living at the site, causing concern on the part of P & Z for the safety of children potentially needing to use the bus drop off area. Furthermore, P & Z notes that, although Avalon offered to post signs at the bus drop off area, the unrestricted use of this area, together with use of the parking spaces to satisfy Wilton's minimal parking requirements, make this an untenable solution to the safety problem.

***13** As discussed above, relative to Avalon's modified proposed amendment to Wilton's zoning regulations and the modified proposal to rezone the subject property, there is insufficient evidence in the record to support parking, alone, as a valid reason for P & Z denying Avalon's site plan application. There are other concerns, however, such as the steepness of the slopes, the single access driveway into the site and traffic in from and onto

Route 7, which, combined with the parking, particularly at the bus drop off area, raise a substantial public interest in safety that outweigh the need for this affordable housing project. These concerns are more fully discussed below.

Denying Avalon's proposed site plan because use of the CL & P easement located on the subject property is "subject to a condition that 'slopes must be stable and not steeper than 3:1 with an access way along the right-of-way, not steeper than 10:1' " is speculative. P & Z's engineering consultant found, as noted in P & Z's original denial of the site plan application, that it does not appear as though Avalon can meet the conditions for use of the easement for parking, thereby exacerbating the parking problems noted above and creating a further safety hazard.

The basis of P & Z's concern with parking in the CL & P easement for transmission lines on the subject property is a June 7, 1999 letter from CL & P to Avalon in which it provides conditions for use of the easement by Avalon for parking. In its resubmission and at the hearing on the modified applications, Avalon contended that its modified site plan complies with these conditions.

In deciding whether to approve Avalon's modified site plan, P & Z was faced with conflicting expert testimony regarding whether Avalon's modified site plan complies with CL & P's conditions for use of its easement for parking. If P & Z were to approve the site plan and Avalon, indeed, violates the conditions for use of the CL & P easement, theoretically, at least, then CL & P will not allow Avalon to use the easement. Avalon, in turn, would then be in violation of the parking requirements contained within the zoning regulations and the town would be faced with enforcing the regulations. P & Z in erring on the side of caution is recognizing the potential problem should Avalon fail to comply with CL & P's requirements for use of the easement. This conjectural concern does not rise to the level of a substantial public interest that outweighs the need for affordable housing concerns regarding habitat impacts for wetlands species and elements of the proposed stormwater management system."¹⁶

Although there is some implication of a public interest should Avalon be unable to provide adequate parking in accordance with the zoning regulations, P & Z fails to meet its burden of showing, in the record, that "such public interests cannot be protected by reasonable changes to the affordable housing development." [General Statutes § 8-30g](#). Thus, the CL & P easement issue fails to provide a valid reason for P & Z to deny Avalon's

modified site plan application.

Infrastructure Considerations: Environmental Impact Statement (Resolution # 100-1Z: Reason 5); Underground Detention Structures (Resolution # 100-1Z: Reason 10); Floodplain Detention (Resolution # 100-1Z, Reason 11); Disturbance for Steep Slopes (Resolution # 100-1REG: Reason 4; Resolution # 100-1Z: Reasons 2 and 13); Height of Retaining Walls (Resolution # 100-1Z: Reason 3); Density of the Development (Resolution # 100-1 MAP: Reason 4)

***14** In denying Avalon's applications for the infrastructure considerations, as well as the traffic considerations, there is sufficient support in the record. Furthermore, there is support in the record for P & Z's finding that the public health and safety implications of Avalon's proposals outweigh the need for this affordable housing proposal at this site.

In denying Avalon's applications for lack of an environmental impact statement, P & Z questions the November 22, 1999 letter submitted by Saccardi & Schiff on behalf of Avalon "purporting to be an environmental impact statement," which states that "since no significant adverse impacts are anticipated, no alternatives are required." P & Z expresses its concern that the disturbance to steep slopes, the amount of regrading and material to be moved, and the height of the retaining walls leads P & Z to the conclusion that there must be some impact to the environment that has not been addressed by Avalon in either its original or modified applications.

In its modified proposed amendment to Wilton's zoning regulations to include the HODD zone, Avalon includes the requirement for an environmental impact statement, which is required under Wilton's current zoning regulations for special permit applications. The current regulation requires an applicant to state that "[t]he extent to which any sensitive environmental features on the site may be disturbed and what measures shall be taken to mitigate these impacts. Consideration shall be given to steep slopes, (including erosion control), wetlands, drainage ways and vegetation and any other land feature considered to be significant."

Avalon submitted an environmental impact statement with supporting documentation with its November 24, 1999 modified applications. In this report, no impacts requiring mitigation were found by Avalon's expert.

P & Z can deny a site plan application "where there is a possibility that approval of the application could result in environmental harm or physical injury to the residents of the development as long as there is a reasonable basis in the record for concluding that its denial was necessary to protect the public interest. The record therefore must contain evidence concerning the potential harm that would result if the [plan was approved] ..., and concerning the probability that such harm in fact would occur." *Kaufman v. Zoning Commission, supra*, 232 Conn. 156.

There are safety issues regarding the disturbance of the slopes on the site, with water detention and with access and traffic that represent substantial public interests in health, safety and other matters P & Z may legally consider. The record contains sufficient evidence of issues of public safety that P & Z found outweigh the need for this development at this site. Despite P & Z identifying these issues, Avalon failed to provide an "adequate" environmental impact statement that addressed the identified issues.

Underground Detention Structures

***15** P & Z states that Avalon "has proposed underground detention structures but has provided no information to accurately evaluate whether these structures would be effective in spring when there are high ground water levels." In response to this concern, John Milone, Avalon's engineer, stated that they reviewed the ground water levels and the test pits and determined that "there's no reason to believe there would be an increase in the seasonal high ground water." Milone also notes that P & Z's expert fails to offer any substantiation for its concern relative to the underground detention structures.

P & Z's concern about the detention structures is based on the town's engineering consultant's comment that "[a] subsurface stormwater structure like those proposed by the applicant should be designed above the seasonal high groundwater to ensure that the structure will function as designed throughout the year. The applicant has not set these structures above the seasonal high groundwater, creating a situation where stormwater may not enter the structure and exacerbate downstream flooding." After reviewing Avalon's presentation at the December 8, 1999 hearing on the modified applications, Fuss & O'Neill followed up its concerns by stating that it "could not find in the application the basis for his claim that 'seasonal

high groundwater would not rise 4-5 feet higher than the levels observed by the applicant.’ “

Thus, the underground detention structure and the potential for exacerbating downstream flooding raises a substantial public interest in both health and safety. Despite P & Z indicating its specific concern in denying Avalon’s original application, Avalon failed to address the concern in its modified application. The capacity of the infrastructure of a proposed development is a substantial concern in deciding whether a particular proposal should be adopted. See *West Hartford Interfaith Coalition v. Town Council*, *supra*, 228 Conn. 510-11. Avalon’s proposals fail to adequately address this concern.

Floodplain Detention

In the original application, P & Z “found that [Avalon] was proposing to fill 3,200 square feet of the 100-year flood plain for detention basin “E.” In the modified design, the town’s engineering consultant stated that the design would result in fill of approximately 4,800 square feet for detention basin “C” ... As a matter of public policy there should be no net decrease in the flood storage capacity because loss of storage (cumulative and per site) could create flooding impacts off site.”

John Milone, Avalon’s engineer, disagreed with P & Z’s expert regarding filling of the floodplain at the December 8, 1999 hearing, stating that, in his opinion, there “will not be any loss of flood storage by this application.” P & Z was faced with conflicting testimony of experts. Avalon made changes to the application to address the concern the town’s expert raised about the floodplain detention. The court is left to conclude that there is insufficient evidence in the record to deny Avalon’s modified site plan application because of flood storage.

Maximum Disturbance for Steep Slopes; Retaining Walls; Density of Development

***16** In originally denying Avalon’s proposed amendment to Wilton’s zoning regulations, P & Z expressed its concern that the proposed regulations did not provide for maximum disturbance of steep slopes. In its modification,

Avalon provided a requirement that a geotechnical analysis and design of retaining walls be submitted prior to P & Z’s approval of a site plan. In denying the modification, P & Z found that “[d]esign of retaining walls in advance of disturbance gives an indication of the type of disturbance that will be encountered on site, but with no upper limit to the amount of disturbance or regrading of steep slopes, the likelihood of erosion both within and off the property during construction cannot be ignored. The absence of any limits to disturbance will provide no incentives for protection of natural contours of the land, protection of existing vegetation or limit the impact of cuts and fills on the property.”

Currently, Wilton’s zoning regulations require that the “maximum height of all retaining walls and slope treatments on slopes steeper than 2:1 in residential districts shall be six feet.” At the December 8, 1999 hearing on Avalon’s modified proposed amendment to the zoning regulations, Ravi Malviya, a geotechnical engineer, spoke regarding a geotechnical report of an investigation done at the subject property and also spoke about the design analysis of the retaining walls. Tom Sheil with Milone and McBroom told P & Z that there was at least one retaining wall on the site which would be ten feet.

The stated purpose in Wilton’s zoning regulations for adoption of the regulations pertaining to protection of slopes is to “maintain the overall environmental quality of the Town, preserve scenic quality, minimize disruption to natural drainage patterns, maintain stability of environmentally sensitive slopes and minimize the aesthetic impact of alteration of hillsides.”

In denying Avalon’s proposed site plan, P & Z reasons that “[t]he modified site development plan does not avoid disturbing steep slopes on the site, and provides no definitive amount of disturbance to steep slopes thereby creating the potential for erosion both within and off-site.” P & Z notes that, “[w]hile [Avalon] provided a geotechnical analysis and engineered plan as part of its proposal, such assessment only serves to confirm the Commission’s previously-expressed concerns that such a site plan is not consistent with the Commission’s responsibility to protect the public interest in the safety of surrounding property and residents.” Furthermore, Wilton’s current zoning regulations require that the “maximum height of all retaining walls and slope treatments on slopes steeper than 2:1 in residential districts shall be six feet.” At the December 8, 1999 hearing on Avalon’s modified applications, Avalon presented expert testimony to support a finding that at least one of the retaining walls on the site would exceed

Wilton's current regulations.

*17 P & Z also reasons that Avalon's proposed site plan should be denied because the proposed retaining walls exceed not only the height allowed by Wilton's current zoning regulations, but exceed the height of such walls in Avalon's proposed amendment to Wilton's zoning regulations, as well. The health and safety issue cited by P & Z as a reason for denying Avalon's proposed site plan is that "children will be living in the proposed development" and the "height of such retaining walls even with safety fencing installed at the top of the wall, is likely to pose a major safety hazard on the site."

Finally, P & Z states that the "proposed development of the site at a density of 113 luxury town houses ignores the severe slopes on the site and impact of wetlands." P & Z goes on to cite the severe off-site impacts of erosion and increase in traffic congestion, which will be detrimental to the health and safety of surrounding property and residents.

P & Z's concerns about the density of the proposed amendment to Wilton's zoning regulations and of the proposed development, is not necessarily a valid reason for denying an affordable housing appeal. See, e.g., *West Hartford Interfaith Coalition v. Town Council*, *supra*, 228 Conn. 511. "In order to qualify as a legitimate basis for denial of an affordable housing application, density must represent a substantial public interest in health, safety or other matters which the commission may legally consider." (Internal quotation marks omitted.) *Thompson v. Zoning Commission, Stratford*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 494184 (January 11, 2000) (Mottolese, J.) (26 Conn. L. Rptr. 318), citing General Statutes (Rev. to 1999) § 8-30g(c)(1)(B). The court must determine whether there is sufficient evidence in the record to support P & Z's findings about the impact Avalon's proposals would have on the health and safety of the surrounding property and residents of the development and then determine whether these concerns, if supported, outweigh the need for affordable housing and whether reasonable changes can be made to the proposals to address P & Z's concerns.

P & Z received comments from Fuss & O'Neill, Inc., regarding the slopes, grading and retaining walls. The town's expert identified three retaining walls in excess of six feet and recommended that safety measures such as fencing be installed to prevent children from falling off the walls.

At the December 8, 1999 hearing on Avalon's modified applications, Avalon's expert testified that the retaining

walls had been evaluated in terms of their stability, but was uncertain as to how many walls would exceed the town's regulation of a maximum height for retaining walls of six feet. No testimony was offered, however, that Avalon would undertake safety measures to address P & Z's concern with the impact of the retaining walls on the safety of the development's residents.

Furthermore, the town's expert referenced discrepancies in maximum cut depths into slopes that would be necessary for road construction. After reviewing Avalon's comments regarding these cuts made at the December 8, 1999 hearing, Fuss & O'Neill followed up their comments by stating that Avalon failed to address earth movement for road construction, but addressed earth movement for foundations. Thus, Avalon failed to address P & Z's concern that the cuts into the slopes were too severe, thereby creating the need for retaining walls that exceed the town's regulations, which were adopted to protect public safety.

*18 P & Z's concern with the development causing severe slope disturbance and the impact on public safety is an example of how density can impact a public safety issue; *Thompson v. Zoning Commission, Stratford*, *supra*, Superior Court, Docket No. 494184 (26 Conn. L. Rptr. 318); if Avalon were to grade the slopes to avoid the severity of the slopes currently proposed, the development would have to be reconfigured to contain fewer units. There is, therefore, sufficient evidence in the record that P & Z, in initially rejecting Avalon's applications, suggested reasonable modifications (i.e., safety measures such as fencing), which Avalon failed to address in its amended applications. There is also evidence in the record that supports P & Z's finding that no further reasonable modifications could be suggested to protect the identified substantial public interest in safety resulting from the severe slopes short of redesigning the site plan. General Statutes § 8-30g does not impose such a requirement on the municipality.

Accordingly, the court finds that there is sufficient evidence in the record to support P & Z's findings that the proposed site plan involves severe cuts into the slopes on the site, Avalon's proposed amendment to the zoning regulations, if adopted, would be violated by the severity of the cuts and that the cuts into the slopes represent a substantial public interest in safety. It is further found that, in weighing the evidence before P & Z, the substantial public interest in safety identified by P & Z outweighs the need for this affordable housing proposal on this site and that P & Z's proposed reasonable modifications to alleviate the identified safety issues were ignored by Avalon, leaving P & Z, as its only alternative,

to propose reconfiguration of the site plan, resulting in less severe grading of the slopes and fewer units within the development. [General Statutes § 8-30g](#) does not impose such a sweeping requirement on the municipality in reviewing an affordable housing proposal.

Traffic Issues: Single Access Driveway (Resolution # 100-1 MAP: Reason 5); Traffic Safety and Single Access Driveway (Resolution # 100-1Z: Reasons 8 and 9); Truck Trips (Resolution # 100-1Z: Reason 4)

P & Z denied Avalon's proposed change of the zone of the subject property to the HODD zone because development of the site, under the proposed amendment to Wilton's zoning regulations, is limited for high-density residential development "due to the continued likelihood that a single access drive will be the only access to the site."

At the September 13, 1999 continuation of the hearing on Avalon's original proposal to rezone the subject property, David Portman of Frederick P. Clark Associates, community planning consultants, spoke to P & Z about the potential impacts on safety of a single access driveway with the grade and curvature involved in Avalon's proposal. In its modified proposal to rezone the property, Avalon reduced the size of the single access driveway from 1050 feet to 450 feet and relocated it so that it was no longer directly across Route 7 from the entry to the self-storage facility. There was also discussion at that hearing about how the driveway had been reconfigured to separate left turns and right turns onto Route 7 and how many vehicles could be backed up on the driveway before it started to taper.

***19** Part of P & Z's concern with the single access driveway is the grade, because it is steep, and the other part of P & Z's concern is the impact of the driveway on traffic safety. While the court could agree with P & Z's consultant, David Portman, that a single access driveway into a development of the size proposed by Avalon constitutes questionable planning, there is insufficient evidence in the record to support P & Z's finding that a single access driveway, as a reason standing alone, implicates substantial health and safety considerations that outweigh the need for affordable housing.¹⁷ As is more fully discussed above, however, the grading into the slope to build the roadway does represent a substantial concern by P & Z with public safety, as does P & Z's concern with the traffic in relation to a single access to a

development of the size proposed by Avalon.

In denying Avalon's proposed site plan, P & Z cites its traffic consultant's concern with the ability of the single access driveway to and from the site to handle inbound and outbound traffic off Route 7. P & Z also expressed its concern with the safety of the development's inhabitants with a single access, although in its modification, Avalon reduced the length of the driveway from 1,050 feet to 440 feet. Yet, according to the town's expert, Avalon continued to ignore the impact on public safety surrounding a single site access drive for a development of this size.

P & Z's concern with the public safety in terms of both the single access and traffic is based on the density of the project, both in terms of the proposed amendment to the zoning regulations to increase the number of units per acre, and in terms of the site plan containing the 113 units. Traffic control is a legitimate goal of zoning. [General Statutes §§ 8-2 and 8-23](#). "The impact of development on traffic and area roads is a legitimate concern affecting the safety and general welfare of the public." *Vineyard Construction Management Corp. v. Town of Trumbull*, *supra*, Superior Court, Docket No. 492251. "Traffic safety is without a doubt a substantial public interest warranting protection ... Moreover, it is not overall traffic that controls, but the density of the traffic." (Citations omitted.) *Mackowski v. Stratford Planning & Zoning Commission*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 334661 (October 22, 1997) (Belinkie, JTR).

For P & Z's decision to deny Avalon's applications based on the substantial public interest of traffic safety warranting protection, "the public interest in traffic safety must also outweigh the need for affordable housing under § 8-30g." *Vineyard Construction Management Corp. v. Town of Trumbull*, *supra*, Superior Court, Docket No. 492251. While it cannot be said that the traffic safety issue clearly outweighs the need for affordable housing, it is *this* affordable housing development that raises the substantial public issue with traffic safety. The court finds that, "on the basis of the evidence in the record, [P & Z] reasonably could have concluded that it could not simultaneously grant the zone change and protect the public interest." *Kaufman v. Zoning Commission*, *supra*, 232 Conn. 166.

***20** P & Z's expert, John Thompson, reviewed Avalon's modified site plan and maintained that the single access driveway would still be a level of service (LOS) F, or a failed condition. Thompson further states that an LOS F is "clearly not desirable." At the December 8, 1999 hearing,

Avalon's expert, Alan Mess, testified that there were sufficient gaps at the revised location of the driveway due to traffic signals at Route 7's intersections with Grumman Road and Route 33. Mess also pointed to a development with a drive on Route 7 that had been approved with an LOS F.

As P & Z's expert states, a LOS F is clearly undesirable, but can be mitigated by such things as construction of accel/decel lanes on Route 7 at the site driveway, a southbound left turn lane on Route 7, the widening of Route 7 opposite the site drive so that cars on Route 7 can bypass cars waiting to make a left turn into the site or right turn-in and right turn-out restrictions at the site drive and Route 7. Despite these suggested mitigation measures, Avalon failed to make any attempt to mitigate the traffic issues raised by its proposals in its modified applications. Rather, Avalon relied on its expert's testimony that a nearby development also had a LOS F turning out of their development, even though the expert also admitted that the nearby development would generate half of the trips projected to be generated by Avalon's development.

Thus, this appeal is distinguishable from *Kaufman v. Zoning Commission*, *supra*, 232 Conn. 162, where "all the evidence in the record showed that the potential traffic problem would be solved by making certain road improvements. The plaintiff, furthermore, *agreed* to make those improvements. On this record, therefore, the commission's decision to deny the zone change was not 'necessary to protect substantial public interests.' [General Statutes § 8-30g\(c\)\(2\)](#)." (Emphasis added.) *Id.* Here, the record evidence shows that Avalon's proposals will create the traffic safety issue and Avalon relies on a nearby development with a LOS F driveway to set a precedent for why P & Z should ignore the substantial safety problems, even though the nearby development has a lower density and generates less traffic. Avalon makes no attempt to mitigate the traffic issues found by both the town's experts and its own experts. P & Z is under no obligation to approve an affordable housing plan that creates a substantial public safety issue. See *Kaufman v. Zoning Commission*, *supra*, 232 Conn. 163 ("This holding reflects the policy concern that, in the face of evidence of impending harm to the public interest, zoning commissions should not grant zone changes without assurances, in the record, that preventive steps will be taken to minimize the risk of harm").

P & Z also denied Avalon's modified site plan application because of the impact of truck trips that are anticipated to "exacerbate traffic congestion on Danbury Road." P & Z points out that the "original estimation of the number of

truck trips amounted to approximately 2,000 truck trips to remove material from the site. In its modification the applicant estimates that there will be a ten percent reduction in the amount of material to be trucked off site, but the applicant provides no support for this contention, which appears to be understated. With cuts on the site far greater than that estimated by the applicant, the Commission's original concern with the impact of truck traffic appears to be increased by the modified application."

***21** P & Z relies on its expert's opinion that the cuts into the slopes to create the access road to the site will be twenty-four to twenty-eight feet, rather than the fifteen feet, as estimated by Avalon's expert. These cuts, in turn, will result in more earth to be removed from the site via trucks, thereby increasing the number of trips to and from the site with access off Route 7. While the court recognizes that the dangers of truck traffic do not clearly outweigh the need for affordable housing; *Old Farms Crossing Associates, LTD v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 547862 (June 6, 1996, Mottolese, J.); such traffic combined with the findings of the experts about the traffic near the site's location does raise a substantial safety issue that outweighs the need for this affordable housing project that creates the substantial safety issue, as more fully discussed above.

Finally, in its appeal brief, P & Z maintains that it could not protect the substantial public interests forming the bases for its denial of Avalon's affordable housing applications by reasonable changes to the proposals because one change would affect another change and P & Z would be left in the position of rewriting Avalon's proposals. Weighing the sufficient evidence contained in the record, the court finds that the record discloses no attempt on the part of Avalon, in its modified applications, to address P & Z's concerns about the single access driveway or related traffic problems articulated in the denial of Avalon's original applications.

The court finds sufficient evidence in the record to support P & Z's decision to deny Avalon's applications and the reasons cited for P & Z's decision based on its concern with the severe cuts into the slopes for the proposed infrastructure, the single access driveway and traffic safety. Weighing the evidence before P & Z at its hearings on Avalon's applications, the court further finds that P & Z's decision is necessary to protect the identified substantial public interest in safety, which public interest clearly outweighs the need for affordable housing, as proposed by Avalon. Finally, the court finds that P & Z

suggested changes to the proposals to mitigate the impacts of the development on the safety issues, but Avalon ignored P & Z's suggestions, choosing, instead, to make minimal changes to its original proposals. Because P & Z's action may be sustained if even one reason is sufficient to support denial of the application; *Primerica v. Planning & Zoning Commission*, *supra*, 211 Conn. 96; and the court finds that several reasons given by P & Z are sufficient to support its decision, Avalon's appeal is denied.

In revising the current version of [General Statutes § 8-30g](#), the legislature intended that the court should determine whether the court would have reached the same conclusion as the zoning commission based on the evidence in the record before the zoning commission. Applying this standard of review to P & Z's reasons for denying Avalon's applications, the court finds that there is sufficient evidence in the record to support P & Z's denials and to support a finding that P & Z met its burden under [General Statutes § 8-30g](#). Accordingly, the court denies Avalon's appeal.

All Citations

Not Reported in A.2d, 2001 WL 1178638

CONCLUSION

Footnotes

- 1 At the time the appeal was filed on February 4, 2000, General Statutes (Rev. to 1999) [§ 8-30g](#) was in effect and provided, in relevant part: "(a) As used in this section: (1) 'Affordable housing development' means a proposed housing development which is (A) assisted housing, or (B) in which not less than twenty-five per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that such dwelling units be sold or rented at, or below, prices which will preserve the units as affordable housing, as defined in section 8-39a, for persons and families whose income is less than or equal to eighty per cent of the area median income or eighty per cent of the state median income, whichever is less, for at least thirty years after the initial occupation of the proposed development; (2) 'Affordable housing application' means any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing; (3) 'Assisted housing' means housing which is receiving, or will receive, financial assistance under any governmental program for the construction or substantial rehabilitation of low and moderate income housing, and any housing occupied by persons receiving rental assistance under [chapter 319uu or Section 1437f of Title 42 of the United States Code](#). (b) Any person whose affordable housing application is denied or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development ... may appeal such decision pursuant to the procedures of this section. (c) Upon an appeal taken under subsection (b) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that (1)(A) the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record; (B) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (C) such public interests clearly outweigh the need for affordable housing; and (D) such public interests cannot be protected by reasonable changes to the affordable housing development ... If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it ... (d) Following a decision by a commission to reject an affordable housing application ... the applicant may, within the period for filing an appeal of such decision, submit to the commission a proposed modification of its proposal responding to some or all of the objections or restrictions articulated by the commission, which shall be treated as an amendment to the original proposal. The filing of such a proposed modification shall stay the period for filing an appeal from the decision of the commission on the original application ..."
General Statutes (Rev. to 1999) § 8-39a provides that " 'affordable housing' means housing for which persons and families pay thirty per cent or less of their annual income, where such income is less than or equal to the area median income for the municipality in which such housing is located, as determined by the United States Department of Housing and Urban Development."
- 2 Avalon submitted its contract to purchase the subject property into evidence, with certain portions redacted.
- 3 Because the plaintiffs modified their original applications pursuant to General Statutes (Rev. to 1999) [§ 8-30g\(d\)](#), the appeal

period from P & Z's original adverse decision was stayed. See note 1 for text of statute.

4 See note 1 for text of statute.

5 Under both the current version of [General Statutes § 8-30g](#) and the prior version, "the scope of judicial review under [General Statutes (Rev. to 1999)] [§ 8-30g\(c\)](#) requires the town, not the applicant, to marshal the evidence supporting its decision and to persuade the court that there is sufficient evidence in the record to support the town's decision and the reasons given for that decision. By contrast, in a traditional zoning appeal, the scope of review requires the appealing aggrieved party to marshal the evidence in the record, and to establish that the decision was not reasonably supported by the record." (Emphasis in the original.) *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 576, 735 A.2d 231 (1999). Neither party disputes that the portion of [§ 8-30g](#) that imposes the burden on the town to marshal evidence to support P & Z's decision remains intact.

6 In the case of a commission's decision made in an administrative, versus legislative, capacity, i.e., a site plan such as the third application submitted by Avalon in the present case (ROR, Exhibit A: Applications: site plan application), judicial review focuses on whether the application conforms to the regulations. See *Housatonic Terminal Corporation v. Planning & Zoning Board*, 168 Conn. 304, 306, 362 A.2d 1375 (1975).

7 P.A. 00-206, § 1(g), amended [§ 8-30g\(c\)](#). See note 1 for text of [§ 8-30g\(c\)](#). P.A. 00-206, "with the deleted portions of the former codification of the statute indicated in brackets, provides in relevant part that '[u]pon an appeal taken under subsection [(b)](f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that [(1)(A)] the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. [;(B)] *The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; [(C)] (B) such public interests clearly outweigh the need for affordable housing; and [(D)] (C) such public interests cannot be protected by reasonable changes to the affordable housing development ...'* (Emphasis in original.) P.A. 00-206, § 1(g)." *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674, 718-19 (2001). The effective date of the legislation is October 1, 2000. See [General Statutes § 2-32](#), which provides, in pertinent part, that "[a]ll public acts, except when therein specified, shall take effect on the first day of October following the session of the General Assembly at which they are passed ..."

8 Avalon argues that the legislature meant to clarify P & Z's burden under [General Statutes § 8-30g](#). "[W]e must begin this analysis differentiating between two different but related concepts [that are commonly misconstrued]: (1) a burden of persuasion; and (2) the scope of judicial review of an administrative decision, including a zoning decision. The concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) a preponderance of the evidence; (2) clear and convincing evidence; or (3) proof beyond a reasonable doubt ... The function of the burden of persuasion is to allocate the risk of error on certain factual determinations, and to indicate the relative social importance of the factual determination at issue ... In a zoning case, the fact finder ordinarily is the zoning agency, not the court. The concept of the scope of judicial review of an administrative decision, by contrast, applies to both the factual and legal decisions made by the administrative agency in question, including a zoning agency, and ordinarily differs depending on whether the court is reviewing a factual or legal determination by the agency ... The function of the scope of judicial review is to express the policy choice, ordinarily drawn from the governing statutes, regarding the allocation of decision-making authority as between the administrative agency and the reviewing courts, and, more specifically, to articulate the degree of constraint that the statutes place upon the courts in reviewing the administrative decision in question. Where the administrative agency has made a factual determination, the scope of review ordinarily is expressed in such terms as substantial evidence or sufficient evidence ... Where, however, the administrative agency has made a legal determination, the scope of review ordinarily is plenary." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission*, *supra*, 256 Conn. 720-21. "In the present case, the amendment to General Statutes (Rev. to 1999) [§ 8-30g\(c\)](#)] addresses the *scope of review*, not the burden of persuasion." (Emphasis in original.) *Id.*, 721. "[T]he statute contemplates that the zoning commission will have made certain factual determinations in the zoning proceedings, and the court is obligated to review those factual determinations pursuant to the scope of review stated in the statute." (Internal quotation marks omitted.) *Id.*

9 Avalon argues in its appeal brief that the legislature amended [General Statutes § 8-30g](#) to "correct" the holding in *Christian Activities Council, Congregational v. Town Council*, *supra*, 249 Conn. 566. (Avalon's appeal brief, pages 19-22.) While the name of the Supreme Court case mentioned in the legislative history of P.A. 00-206 is not given, in the Conn. Joint Standing Committee Hearings, Housing, February 16, 2000, pp. 14-15, Representative Googins, referring to the element that is most controversial

about the proposed legislation as the burden of proof issue, asked if the procedure in the appeals case had to do with the Glastonbury acquisition activity council Supreme Court case. Robin Pearson, one of the chairs of the blue ribbon commission, responded that "[t]he burden was understood in a way that turns out to be different from the way the court analyzed the burden in the CAC decision." Conn. Joint Standing Committee Hearings, *supra*, p. 15. This portion of the hearings, although not directly citing the *Christian Activities Council* case, supports Avalon's statement that the Supreme Court case referred to in the legislative history is *Christian Activities Council. Congregational v. Town Council, supra*, 249 Conn. 566. See also *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra*, 256 Conn. 726.

10 The finding that the legislature did not intend for the court to conduct a trial de novo is also supported by the legislative history. In responding to a question by Representative Robert Ward of the 86th district about how the proposed change to the legislation clarified the standard of review, Representative Flaherty responded that "[u]nder the affordable housing appeals procedure, and it's in the statute, a town has the burden to prove that the public purpose for which the application was rejected outweighs the need for affordable housing and that's a fairly straightforward thing to say. And then the question becomes, who decides whether or not the town or the Commission has met its burden of proof. And what needed to be clarified was that the court does need to make a decision as to whether or not the town has met its burden. The proposed amendment clarifies that without adding an additional burden on the town. The town merely has to, *the court needs to examine the record* and the court determines whether or not the town has met its burden of proof. There were some who had argued that the matter of law words would have required the court to actually have a whole new trial, perhaps have witnesses, perhaps have evidence that went beyond the record that had been established by the Commission. So deleting the words matter of law means that we do not, *we are not going to require the courts to hear witnesses or in effect, conduct a new trial but that they can rely entirely upon the record that has been made by the Commission.*" (Emphasis added.) 43 H.R. Proc., Pt. 14, 2000 Sess., pp. 4657-58.

11 In *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra*, 256 Conn. 723, the court further cited to remarks made by Senator Eric D. Coleman, in explaining the purpose of the amendment, who stated: "[T]he bill seeks ... to *make clear* that in the situation of the denial of an affordable housing application, that in the review of that application, there is a two step review process. The first step that is made by the court would be to determine whether or not there is simply sufficient evidence to uphold the decision of a land use authority and that would be a threshold determination. If the court determined that there was not sufficient evidence, then the appeal which would probably be brought by the developer would be upheld ... Then the court would move to the second step and that step would be to determine whether or not the decision of the [c]ommission is based upon the protection of some substantial public interest, whether or not that public interest clearly outweighs the need for affordable housing, and finally, whether or not [there are] any modifications that can reasonably be made to the application which would permit the application to be granted." (Emphasis in original.) *Id.*, quoting 43 S.Proc., Pt. 8, 2000 Sess., pp. 2602-03.

12 The portion of *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 735 A.2d 231 (1999) to which the legislature responded by changing the scope of judicial review under § 8-30g, rather than a commission's burden, was that part of the opinion in which the court states: "Put another way, in determining whether the commission had sustained its burden under [General Statutes (Rev. to 1999)] § 8-30g(c) subparagraph (B) of establishing that its decision was 'necessary to protect substantial interests in health, safety, or other matters which the commission may legally consider,' the court does not itself weigh the record evidence. Instead, the court applies the 'sufficient evidence in the record' test of [General Statutes (Rev. to 1999) § 8-30g(c)] subparagraph (A). The court reviews the evidence and asks whether there was sufficient evidence for the *commission*, based on that evidence, reasonably to have concluded that there was some probability, not a mere possibility, that its decision was necessary to protect those interests." (Emphasis in the original.) *Id.*, 589.

13 "The narrow rigorous standard of § 8-30g dictates that the commission cannot deny an application on broad grounds such as noncompliance with zoning ... Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the commission to satisfy the statutory burden of proof" and "determine whether the regulations are necessary to protect substantial public interests in health, safety or other matters." *Wisniewski*, at 317.

14 The court notes that Avalon appealed the subsequent denial by Wilton's Inland/Wetlands Commission of its modified permit application on March 23, 2000 for the sole reason of protection of the upland habitat of an obligate wetland species. See *AvalonBay Communities, Inc. v. Wilton Inland Wetlands*, Superior Court, judicial district of New Haven at New Haven, Docket No. 177756. While Avalon has prevailed in that matter, this decision is written without regard to the later court ruling, taking into account that which existed, only, at the time of the hearing before the court. For reasons clear in other parts of this decision, the P & Z decision regarding this issue is not ultimately necessary, in any case, for a disposition of this appeal.

15 General Statutes § 8-3(g) provides, in relevant part: "If a site plan application involves an activity regulated pursuant to sections

22a-36 to 22a-45, inclusive, the applicant shall submit an application for a permit to the agency responsible for administration of the inland wetlands regulations not later than the day such application is filed with the zoning commission. The decision of the zoning commission shall not be rendered on the site plan application until the inland wetlands agency has submitted a report with its final decision. In making its decision the zoning commission shall give due consideration to the report of the inland wetlands agency. A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations ...”

16 P & Z has at least two obvious options. One is that it can make approval of Avalon’s modified site plan contingent on Avalon producing documentation that CL & P has reviewed its modified site plan and agrees with Avalon that the revisions to the September 3, 1999 site plan accord with CL & P’s requirements. The other option is to withhold certificates of occupancy if Avalon is denied use of the easement by CL & P and, therefore, violates the zoning regulations for parking.

17 At the September 13, 1999 hearing, Avalon presented comments from Wilton’s fire chief who said that they could get fire vehicles to the property in the event of an emergency and that emergency medical services would be available with the fire response. (ROR, Transcript of September 13, 1999 hearing, page 42.) Avalon also presented information at the September 13, 1999 hearing regarding other multi-unit developments in Wilton, that show that sixty-six percent of such complexes have single access drives. (ROR, Transcript of September 13, 1999 hearing, page 42.) Thus, the evidence before P & Z supports a finding that a single access drive, per se, does not constitute a substantial public interest in health or safety because there are numerous developments in Wilton which are served by a single access driveway.

2009 WL 4282204

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

GARDEN HOMES MANAGEMENT
CORPORATION et al.

v.

PLANNING AND ZONING COMMISSION OF the
TOWN OF OXFORD.

No. HHBCV074015729S.

|
Nov. 3, 2009.

Attorneys and Law Firms

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[JOHN W. PICKARD](#), Judge.

I. Facts and Procedural History

*1 The plaintiffs, Garden Home Management Corporation and Third Garden Park Limited Partnership, appeal from decisions of the defendant, Planning and Zoning Commission of the Town of Oxford (“Commission”) denying applications for: 1) a text amendment to the Zoning Regulations of the Town of Oxford, 2) an amendment to the zoning map to rezone the plaintiffs’ property, and 3) an application for a zoning permit and for site plan approval for the development of 113 mobile manufactured dwellings. Garden Homes Management Corporation is the managing partner of Third Garden Park Limited Partnership. The parties filed lengthy briefs and

engaged in oral argument. The court made a site visit with the attorneys on April 24, 2009.

The plaintiffs own 40.7 acres of undeveloped land in Oxford (“the property”). The property is bounded by Hurley Road to the south, Donovan Road to the east and Oxford Airport Road to the north. Oxford Airport Road is a state-controlled limited access highway which provides access to the Oxford Airport. There is a substantial inland-wetland area which divides the property into two buildable sections. One section, known as Oxford Commons East, is proposed to have 14 units, all of which will have access to Donovan Road from a single interior road. Another section, known as Oxford Commons West, is proposed to have 99 units, all of which will have access to Hurley Road from a single interior road.

Article 9A of the zoning regulations and the zoning map locate the property in the Corporate Business Park District (“CBPD”). The CBPD was established in 2000 by removing 440 acres from the existing 2,400-acre Industrial District. Most of the site is old agricultural fields. The surrounding CBPD area is undeveloped, except for Hurley Farms Business Park to the south across Hurley Road, and the regional airport to the east. The land remaining in the Industrial Zone is largely undeveloped. However, there are single-family homes scattered along virtually every roadway in the airport vicinity.

The applications for amendment of the Regulations and the zoning map would create a new residential district and would rezone the property from the existing CBPD to the new residential district. The plaintiffs filed their applications pursuant to [C.G.S. § 8-30g](#), the Affordable Housing Appeals Act. The plaintiffs proposed to set aside 30% (35 of the 113) units as “affordable” units as set forth in [§ 8-30g](#).

The Commission held a public hearing which extended over four evenings during the summer and fall of 2006. During the hearing, the Commission received verbal, written, and documentary evidence from the plaintiffs, the public, and from the Commission itself. In a 62-page memorandum dated February 1, 2007 the Commission denied the applications. First, the Commission decided that the Industrial Use exception to the affordable housing statute applied to the applications. Accordingly, the Commission reviewed the applications in conformance with normal zoning standards and set forth its reasons for denial. The Commission then reviewed the applications again as if they were entitled to be treated as affordable housing applications and concluded that they should be denied under those standards as well. In February 2007

the plaintiffs filed a “resubmission application” with the Commission. A public hearing lasting three evenings was held in May and June 2007. Additional evidence was received. On September 20, 2007 the Commission again denied the applications, this time in a 63-page decision. The Commission followed the same format used in the original decision by first deciding that the applications failed to qualify for treatment under affordable housing standards, but then reviewing the applications under those standards as well as normal standards. This appeal followed. The plaintiffs appeal only the decision denying the resubmission applications, not the original denial.

*2 The reasons for appeal are that the Commission’s decision does not satisfy its burden of proof under C.G.S. § 8-30g(g) in that the reasons for denial, a) are not supported by substantial evidence in the record, b) are not based upon substantial interests in public health and safety or other matters that the Commission may legally consider, c) do not clearly outweigh the need for affordable housing in Oxford; and d) could have been addressed by reasonable changes to the Application.

The CBPD permits the following uses:

- 4.1 Business or corporate offices
- 4.2 Research and development facilities, including laboratories
- 4.3 Data processing facilities
- 4.4 Manufacturers showrooms and sales offices
- 4.5 Printing and publishing services
- 4.6 Broadcast and media production facilities
- 4.7 Manufacturing and assembly, if conducted entirely within a building. The CBPD also permits the following uses by special exception:
 - 5.1 Wholesale and Distribution uses provided that they are a component of a corporate or business office or manufacturing use.
 - 5.2 Warehouses, providing that they are a component of a corporate or business office or manufacturing use.
 - 5.3 Restaurants, excluding drive through facilities
 - 5.4 Hotels.
 - 5.5 Child day care facilities.
 - 5.6 Health and fitness clubs.

5.7 Schools-Colleges, universities, technical, trade, vocational, and business. The Regulations also permits bed and breakfast accommodations by special exception in any district provided they are located in the home of the owner/operator.

Article 9 of the Regulations creates the Industrial District from which the CBPD was removed in 1999-2000. The Industrial District permits:

- 2.1 Wholesale & Distribution.
- 2.2 Manufacturing and Assembly when conducted entirely within a building.
- 2.3 Warehousing and storage only in conjunction with manufacture and assembly or other permitted use.
- 2.4 Broadcast and media production.
- 2.5 Banks and financial institutions.
- 2.6 Business, Professional & Corporate Offices
- 2.7 Aviation Facilities.
- 2.8 Printing, publishing, blueprinting & similar reproduction.
- 2.11 Temporary lodging when done in conjunction with corporate training as an accessory use to an industrial use. Such temporary lodging shall be for a maximum of ten days within any calendar month, as an accessory use.

The Industrial District creates the following uses by Special exception:

- 3.1 All uses with a gross floor area of 50,000 square feet or greater.
- 3.2 Outdoor manufacture or assembly.
- 3.3 Monument and stone cutting.
- 3.4 Garden supply centers, and nurseries.
- 3.5 Government Buildings.
- 3.6 (Deleted).
- 3.7 Lumber and Building supply storage and sales.
- 3.8 Restaurants.
- 3.9 Sale of alcoholic beverages.

3.10 Veterinary hospitals.

3.11 Undertaker establishments, crematories and funeral parlors.

3.12 Child day care center.

*3 3.13 Cat-washes.

3.14 Medical offices.

3.15 Commercial/Recreational Facilities.

3.16 Garages and Filling Stations.

3.17 Heavy Equipment sales, storage and rental.

3.18 Public Parking Lots.

3.19 Gas powered generating facilities.

3.20 Drive through facilities of permitted uses or uses permitted by special exception.

3.21 Retail uses when accessory to a manufacturing or other principal use.

3.22 Contractor's yards.

II. Aggrievement

Aggrievement is a jurisdictional question and is a prerequisite to maintaining an appeal. *Winchester Woods Associates v. Planning and Zoning Commission*, 219 Conn. 303, 307, 592 A.2d 953 (1991). In affordable housing appeals, as in traditional zoning appeals, the plaintiff has the burden of establishing aggrievement. *Trimar Equities, LLC v. Planning & Zoning Board*, 66 Conn.App. 631, 638-39, 785 A.2d 619 (2001). C.G.S. § 8-30g(f) provides that any person whose affordable housing appeal is denied may appeal. In addition, "owners of property that is the subject of an application are aggrieved, and the plaintiffs may prove aggrievement by testimony at the time of trial." *Winchester Woods Associates v. Planning and Zoning Commission*, *supra*, at 308, 592 A.2d 953. The plaintiffs are aggrieved as the owners of the property which is the subject of their applications denied by the Commission.

III. Standard of Review

Judicial review of a planning and zoning decision on an affordable housing application is governed by C.G.S. 8-30g(g). That section provides:

(g) Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall have the burden to prove, based upon the evidence in the record compiled before the commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2)(A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subsection (a) of this section. If the Commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.

"[In conducting its review in an affordable housing appeal, the trial court must first determine whether 'the

decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record.’ [General Statutes § 8-30g\(g\)](#). Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission’s decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development.” (Internal quotation marks omitted.) [Carr v. Planning & Zoning Commission](#), 273 Conn. 573, 596-97, 872 A.2d 385 (2005), or whether the application would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and the development is not assisted housing.

*4 C.G.S. § 30g(g) “reveals two different burdens of proof for appeals brought pursuant thereto. Subpart (1) applies to traditional affordable housing appeals and subpart (2) applies to affordable housing appeals that seek to locate housing in an area zoned for industrial use. Under both alternatives, the burden is on the commission first to cite the reasons for their decision, and to demonstrate that the reasons cited for such decision are supported by sufficient evidence in the record. Second, the commission shall also have the burden to prove one of two things: if it is a traditional affordable housing appeal, the commission must satisfy the three-pronged test set forth in parts (1)(A)(B) and (C). If the application seeks to place housing in an area zoned for industrial use, the commission must only satisfy the two-pronged test set forth in parts (2)(A) and (B).” (Internal quotation marks and citations omitted.) *Jordan v. Old Saybrook Zoning Commission*, Superior Court, Judicial District of New Britain at New Britain, Docket No. 0110508891 (October 31, 2003).

“In the present case, if the commission establishes the applicability of the industrial zone exemption, it must only show that the reasons it cited are supported by sufficient record evidence. If, however, the industrial zone exemption does not apply, the commission must satisfy the heightened burden of proof set forth in part (1) of the statute. As the industrial zone exemption is determinative of the commission’s burden of proof and the scope of this court’s review, its applicability must be determined at the outset. [C.G.S. § 8-30g\(g\)\(2\)](#), the industrial zone

exemption, sets forth a less stringent burden of proof than that set forth in [§ 8-30g\(g\)\(1\)](#).” *Id.* The language of the statute, and the Superior Court cases which have considered it, indicate that the appropriate standard of review for whether the commission has met its second burden of proof is plenary review. *Baker Residential Limited Partnership v. Berlin Planning and Zoning Commission*, Superior Court, Judicial District of New Britain at New Britain, Docket No. 06 4012368 (September 10, 2008) [[46 Conn. L. Rptr. 309](#)].

IV. The Need for Affordable Housing

The record demonstrates that the Town of Oxford has a substantial need for affordable housing. Oxford falls below the “safe harbor” established by C.G.S. § 30g(k) for towns having at least 10% of all their dwelling units qualify as affordable under the formula established by that section. In Oxford, the percentage of dwelling units qualifying as affordable is only 1.1%, ranking Oxford near the bottom of Connecticut’s 169 municipalities.

The record reveals that Oxford has done little or nothing to address the need for affordable housing. Since 1991, [C.G.S. § 8-2](#) has required all municipalities to adopt zoning regulations that “promote housing choice and economic diversity in housing, including housing for both low and moderate income households.” The Oxford regulations do not contain any provisions which seriously address this requirement.

V. Discussion

A. The Reasons for Denial

*5 The Commission cited several reasons for denying the plaintiffs’ applications. In accordance with the standard of review set forth above, the court must first determine whether the record contains sufficient evidence to support the reasons cited by the Commission for its decision.

1. Set Aside Development

The first issue which must be addressed is the Commission's argument that the application does not come within the definition of a "set aside development" in [C.G.S. § 8-30g\(a\)](#), and thus is not an "affordable housing application." That section defines an affordable housing development as assisted housing or a set-aside development. This project is not assisted housing.

A set-aside development is defined as "a development in which not less than thirty per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that, for at least forty years after the initial occupation of the proposed development, such dwelling units shall be sold or rented at, or below, prices which will preserve the units as housing for which persons and families pay thirty per cent or less of their annual income ...". The Commission argues that there must either be a sale or a rental-but not a combination of the two-in order to qualify.

Here, the applicant proposed to sell the dwellings and rent the land where the building is located. The Commission claims that the combination of sale and rental does not qualify. This argument must be rejected because it is not based upon a fair reading of the language of § 30g(a). I can see nothing in the language of the definition of a set-aside development which would disqualify the sale and rental scheme proposed by the plaintiffs, provided that the Affordability Plan accounts for the sales price and the rent so that it qualifies as affordable under the statute and the regulations of the Department of Economic and Community Development. The Affordability Plan properly treats the manufactured homes as sale units with the paid rent included in monthly expenses. The plaintiff's explanation of the calculations employed in the Plan convinces the court that the Plan complies with the statute and the regulations. For this reason, the Commission's decision that the plaintiffs' applications do not constitute a set-aside development is not supported by sufficient evidence in the record.

2. Industrial Use Exemption

Next, the Commission argues that because of the industrial use provision in [C.G.S. § 8-30g\(g\)\(2\)\(A\)](#), the

proper standard of review is as a traditional application rather than as an affordable housing application. That sub-section provides an exception to the burden-shifting required for affordable housing applications generally: burden-shifting does not apply to land that is "located in an area which is zoned for industrial use and which does not permit residential uses." Therefore, in order to apply the industrial use exception, the Commission was required to prove (1) that the area is zoned for industrial use, and (2) the area does not permit residential use. The plaintiffs contend that the Commission has not proven either element. The parties agree that the court's review of this issue must be plenary.

***6** In its decision, the Commission determined that the CBPD was zoned for industrial use by finding that some of the uses permitted in the district are industrial uses. The Commission relied upon evidence from the Commission's professional planner, Brian Miller, that the CBPD includes industrial uses and does not permit residential uses. Mr. Miller pointed to "manufacturing and assembly, if conducted entirely within the building," research and development facilities, data processing facilities, manufacturers' showrooms and sales offices, printing and publishing services, and broadcast and media production facilities as uses permitted, as of right, which are industrial in nature. Mr. Miller referred to the history of the CBPD which was created out of the Industrial Zone for the purpose of implementing higher quality design standards but was not a significant departure from the planned uses of that zone. He also referenced the 1900 update of the Plan of Conservation and Development which specifically recommended the creation of a Corporate Business Park District to implement the goal of corporate office, research and development and high quality light manufacturing uses for the area west of the airport. Mr. Miller stated that: "Contemporary zoning practice recognizes that a range of complimentary uses are needed in industrial zoning districts. Most communities have more than one industrial zoning district, with a 'light industrial district' having higher design standards and more limited uses. The Corporate Business Park District essentially serves as Oxford's light industrial district."

The plaintiffs argue that the CBPD is not identified in the regulations as an industrial zone; it is identified as a business park zone. Oxford has an Industrial Zone from which the CBPD was removed in 2000. The plaintiffs argue that the uses permitted in the CBPD are business uses, not industrial uses. They see no overlap with the uses permitted in the Industrial Zone. They contend that the industrial use exemption must be narrowly construed because it is an exemption from a remedial statute, that

the Commission's interpretation of its own regulations is not entitled to deference, and every inference must be made in favor of applying § 8-30g and against the exemption.

There is no specific appellate authority to guide the court in applying the industrial use exemption. However, there are two Superior Court cases which have been cited by the parties. In *Jordan v. Old Saybrook Zoning Commission*, Superior Court, Judicial District of New Britain at New Britain, Docket No. 010508891 (October 31, 2003), Judge Tanzer refused to apply the industrial use exemption to property located in a B-2 Shopping Center Business District despite the commission's arguments which are similar to the arguments made by the Commission in this case. Although the court agreed with the commission that some of the uses permitted in the B-2 zone overlapped with some of the uses permitted in Old Saybrook's two industrial districts, it determined that the fact that two different zones permit some of the same uses does not mean that the two zones are interchangeable. It is the differences in the permitted uses, not the similarities, that are important. In support of this proposition, Judge Tanzer pointed out several uses which were permitted in the industrial zones but not in the business zone. She also stated that: "In assessing whether the B-2 zone falls within the industrial zone exemption, this court is mindful of the legislative purpose behind the affordable housing land use appeals statute which is to encourage and facilitate the much needed development of affordable housing throughout the state, and that, as a remedial statute, § 8-30g must be liberally construed in favor of those whom the legislature intended to benefit. If this court were to adopt the broad interpretation of § 8-30g(g)(2) advanced by the commission and expand the exemption to include not only areas zoned for industrial use but also areas in which permitted uses overlap with areas zoned for industrial use, it would thwart the important purposes of the statute to promote the development of affordable housing. It is an established and long-held rule that statutory exceptions are to be strictly construed." (Internal quotation marks omitted; citations omitted.) *Id.* Therefore, the court concluded that the B-2 Shopping Center Business District was not an area zoned for industrial use and that the industrial zone exemption was not applicable to the plaintiff's applications.

*7 The second Superior Court case to have considered the industrial zone exemption is *Baker Residential Limited Partnership v. Berlin Planning and Zoning Commission*, Superior Court, Judicial District of New Britain at New Britain, Docket No. 06 4012368 (September 10, 2008), decided by Judge Cohn. In that case the plaintiff sought to

develop an affordable housing project in the Office Technology (O.T.) zone which was listed in the Berlin Zoning Regulations under the industrial zone category. The commission found that the area of the application was zoned for industrial use and applied the industrial use exemption. Judge Cohn agreed with Judge Tanzer that the court must conduct a plenary review of the record to determine whether the industrial zone exemption applies. Judge Cohn also agreed with Judge Tanzer that the town's own decision regarding the designation of the zone in question is "persuasive, if not dispositive." In the *Jordan* case, the Old Saybrook Zoning Commission had not categorized the B-2 Shopping Center zone as an industrial zone. In the *Baker* case, the Berlin Planning and Zoning Commission had categorized the O.T. zone as an industrial zone. Judge Cohn stated, "The zoning regulations establish the O.T. zone is zoned industrial." He also agreed with the plaintiff that the O.T. zone permits both modern and traditional industrial uses. Therefore, he found that the area is zoned for industrial use. The facts in the present case are distinguishable from those in that case.

In this case, the Commission does not categorize the CBPD as an industrial use. It acted to create the CBPD in 2000 and to remove the CBPD from the Industrial District in 2000. It could have established the CBPD as a second industrial zone but it decided not to do so. Although the Commission is correct that labels are not determinative, they are important, particularly where they were written by the Commission. Further, although the CBPD permits some uses which might be considered modern industrial uses, they are the exception to the business uses which predominate. In contrast, the Industrial Zone permits uses which are predominantly although not exclusively industrial in nature. I agree with Judge Tanzer that it would thwart the important purposes of the affordable housing statute to promote the development of affordable housing if the Commission were permitted to consider the CBPD as zoned for industrial uses despite removing it from the industrial zone and categorizing it as a business zone which permits only a few uses which might be considered industrial.

Although I generally agree with Judge Tanzer's analysis, I also agree with Judge Cohn's position that § 8-30g(g)(2) is not an exception to a remedial statute but is really an alternative to the three-part analysis under C.G.S. § 8-30g(g)(1). Therefore, the language of § 8-30g(g)(2) does not need to be given a narrow construction. But, even without a narrow construction, I do not find that the language of § 8-30g(g)(2) applies to the facts of this case. The CBPD is simply not an industrial zone; it is a business park zone. I agree with the plaintiffs that if the

Commission's reasoning were adopted, every zoning commission could undermine § 8-30g merely by inserting a few potential industrial uses into every non-residential zone. For the reasons given above, the court finds that the applications would not locate affordable housing in an area zoned for industrial use.

*8 The second prong of the industrial use exemption test requires a finding that the area of the proposed development does not permit residential uses. But, because of the court's finding that the area is not zoned for industrial use, the court does not need to consider the issue of whether the CBPD permits residential uses.

In summary, the Commission's decision that the industrial use exception applies to the plaintiffs' applications is not supported by sufficient evidence in the record. Consequently, if sufficient evidence exists for any of the other reasons for denial, the court will conduct a plenary review of the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, and whether the risk of such harm to such public interest clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development.

3. Oxford Plan of Development, Regional Plan of Development and Policy of American Planning Association.

The next reason for denial given by the Commission is that the proposed rezoning is inconsistent with the goals in the Comprehensive Plan of Development, the Regional Plan of Development and the policy advocated by the American Planning Association. The 1999 update for the Plan of Conservation and Development recommends that the area of the project serve as a site for "modern, growing businesses and industries." It encourages "the development of Airport Access Road as a 'high tech' boulevard, in line with attractive, contemporary buildings housing emerging, growing businesses." The 1998 Central Naugatuck Valley Regional Plan for the towns in that area, including Oxford, identified the Industrial/CBPD area as a major economic area and recommends guiding economic development activities in this area. The Policy Guide on Manufactured Housing published by the American Planning Association recommends that manufacturing be allowed in residential

zoning districts. The Commission claims that the location of manufactured homes in the CBPD is inconsistent with each of these.

This argument must fail because even if these recommendations and policies amount to sufficient evidence, and even if they rise to the level of a substantial public interest in health and safety, the Commission has failed to sustain its burden of showing that they outweigh the need for affordable housing. The need for affordable housing is clear and powerful; the recommendations of the Comprehensive Plan of Development, the regional Plan of development and the recommendations of the American Planning Association are advisory only. See, e.g. *Dutko v. Planning and Zoning Bd. of City of Milford*, 110 Conn.App. 228, 954 A.2d 866, (2008) There are Superior Court cases cited by the plaintiffs which hold that a town plan cannot serve as the basis for the denial of an affordable housing application. See, e.g. *TCR New Canaan, Inc. v. Planning and Zoning Commission*, Superior Court, Judicial District of Hartford-New Britain, at Hartford, Docket No. 94050477 (June 9, 1995).

4. Impact Upon the Overall Economic Development

*9 Next, the Commission argues that the proposed rezoning would have a detrimental impact upon the overall economic development within the Industrial/CBPD area. The Commission phases it this way: "The approval of this application would remove a large parcel of land directly from any potential for economic development. It would also have an adverse impact upon potential CBP use of other properties within the District by undermining demand for adjacent Industrial/CBP properties, thereby reducing job growth and growth in the Town's Grand List." There was testimony from experts and lay witnesses about these adverse impacts as well as an adverse impact upon Oxford's pending application for foreign trade zone designation in its CBPD and Industrial Districts. The Commission's planner, Brian Miller, testified about the detrimental impact of locating a residential development in the midst of the CBPD. Donald Klepper-Smith, an economist, testified that Oxford would suffer a permanent loss to job growth and to the town's grand list if the property were to be rezoned to residential.

The plaintiffs argue, in opposition, that the considerations raised by the Commission amount to fiscal zoning which is illegal in Connecticut, even in traditional zoning cases.

The plaintiffs have cited several Superior Court cases in support of this proposition. The Commission has cited *United Progress, Inc. v. Borough of Stonington Planning and Zoning Commission*, Superior Court, Judicial District of Hartford-New Britain, at Hartford, Docket No. 920513392 (March 4, 1994), for the proposition that the protection of industrial land can rise to the level of a substantial public interest in health and safety which can outweigh the need for affordable housing. That case, decided by Judge Berger, rests upon facts which are much different from those here. The Borough of Stonington is a very small historic area on a peninsula. Situated among the many historic homes is one small parcel of industrial land which was the former site of a Monsanto factory. The applicant in that case sought to convert the property to residential use with an affordable housing project. The court found that the need to preserve this one industrial parcel was a substantial public interest which outweighed the need for affordable housing. The Borough had only 3.9% of the total housing units qualify as affordable housing but Judge Berger noted that there were 352 multi-family units, 193 of which were rented for less than \$750 per month, within the upper limit of the affordable housing definition. So, the borough had a need for affordable housing but not nearly as dire as Oxford's need. More importantly, Oxford, unlike the borough, has significant other land zoned for industrial use. There are still nearly 2000 acres remaining in the industrial zone and nearly 400 more acres in the CBPD. Finally, the parcel had for many years been the site of a factory. The site in this case had been a farm. Therefore, the *United Progress* case decision is factually distinguishable and cannot be used as persuasive precedent.

***10** The court finds that even if the financial considerations raised by the Commission amount to sufficient evidence, and even if they rise to the level of a substantial public interest in health and safety, the Commission has failed to sustain its burden of showing that they outweigh the need for affordable housing. My plenary review of the Commission's evidence reveals that it is based upon speculative assumptions about the probability of industrial growth. The evidence, particularly from Mr. Klepper-Smith, is entitled to some weight, but not nearly as much as the Commission gave it. On the other hand, the need for affordable housing is not speculative at all. It clearly outweighs the economic concerns of the Commission.

5. Inconsistency with Waterbury-Oxford Airport Plans

The commission found that concerns about noise from the airport were sufficient to deny the plaintiffs' applications. The court has reviewed the evidence on this point and finds that the Commission's concerns are overblown. The evidence is that the planes taking off from and approaching the airport do not fly over the subject property. The noise study commissioned by the Connecticut Department of Transportation indicates that the subject property lies outside the area which would receive dangerous levels of noise. Further, the Commission has approved other residential developments in recent years which receive at least as much noise from the airport. Finally, the fact that child day care facilities and schools are permitted in the CBPD by special exception runs counter to the Commission's claim that residential uses will cause health and safety concerns. My plenary review of the record does not reveal that the concern for noise rises to the level of a substantial interest in health or safety.

6. Site Plan Issues

The Commission articulated eleven "concerns" with the site plan which were raised by the expert testimony from the town engineer, traffic consultant, fire chief, and/or planning professionals. The plaintiffs argue that the court should disregard these concerns in its review because they do not believe that the Commission has properly briefed these concerns by citing or reviewing the record evidence, explaining the harm or unsafe condition which may result from each concern, or explaining why these concerns clearly outweigh the need for affordable housing. Therefore, the plaintiffs argue that the Commission has abandoned these concerns as denial reasons. In answer to this argument, the Commission says: 1) it agrees that these concerns could be addressed by reasonable changes; and that 2) it did address these issues in its brief and by incorporating the Commission's lengthy decision and record references as an appendix to its brief.

It is true that the Commission's use of an appendix could be viewed as a way to exceed the page limit on the initial brief. The Commission also used its reply brief to amplify arguments which could have been made in the initial brief. The plaintiffs urge the court to consider that all of the Commission's arguments made in this fashion have been abandoned. Although the court is tempted to follow the plaintiffs' advise, some of the Commission's "concerns" about the site plan raise important health and safety issues which deserve to be considered by this court.

These concerns will be addressed in order.

***11** The Commission found that the development would exacerbate an unsafe traffic condition on Bristol-Town Road by increasing two-way traffic in a narrow 16' wide road where the stopping distance is limited, thereby increasing the likelihood of accidents and reducing safety. The 99 units in Oxford Commons West will have their sole access and egress on Hurley Road. To the west, Hurley Road soon crosses into Southbury where it is known as Bristol-Town Road. The Town of Southbury and the Commission's traffic consultant both opined that the present road is narrow, presents safety issues, and that added traffic will exaggerate the safety problems. The plaintiffs argue that this issue has been addressed by an amendment to the site plan to require that all traffic exiting the site by Hurley Road to turn left, following Hurley Road to Donovan Road to Oxford Airport Road. This refinement prevents outgoing traffic from using Bristol-Town Road. Also, the Hurley-Donovan-Airport Roads route will be widened and repaved. The Commission expressed concern that this refinement may not prove to be effective in preventing left turns onto Hurley Road and would only address exiting traffic, not traffic entering the site, especially during the afternoon commuting time.

My own review of the record does not lead me to conclude that the Commission's safety concerns amount to a substantial public interest which clearly outweighs the need for affordable housing. Even if they did, these concerns can be handled by reasonable conditions which address the Commissions' concerns. After all, the Commission desires to reserve this land for business uses which could present even more difficult traffic issues, especially with large trucks. The Commission should impose reasonable conditions, just as it would have done if the plaintiffs had proposed a business use.

The second health and safety concern also involves access to the site. The Commission found that the portion of the project containing 99 units known as Oxford Commons West will have only one entrance and that there should be two distinctly separate routes, each located as remotely from the other as possible. The expert evidence on this point is conflicting. The plaintiffs rely upon their expert who testified that the plans were safe and in accordance with national standards, provided that there were an emergency access which could be used by emergency vehicles. The site plan shows an emergency strip¹ from Oxford Access Road to the corner of the closest dead-end road within the development. The testimony at the hearing was that this strip would gated to prevent normal access and egress but could be opened by emergency

personnel. The site plan review of the plaintiffs' fire safety expert, Joseph Versteeg, dated April 18, 2007 specifically states: "The provision of a remotely located secondary access roadway ensures access to the site in the unlikely event the primary entrance route is blocked. The alternative plan depicting an emergency access roadway likewise ensures access to the site in the unlikely event of a blockage." The Commission's own experts opined that a second access road, not just an unpaved emergency entrance, is critical for safe and efficient access and egress.

***12** In opposition to the Commission's experts, the plaintiffs argue that the entrance on Hurley Road will be divided by islands which will separate the entering and existing traffic, making it more difficult to block. However, the Commission's expert opines that this layout does not provide sufficient geometry to be considered anything other than a single access. My own review of the record leads me to conclude that a single access point for the 99 units in Oxford Commons West presents a serious health and safety issue which clearly outweighs the need for affordable housing. Affordable housing units should be just as safe as any other form of housing. The emergency access proposed by the plaintiffs is inadequate to safeguard the residents from the danger of one entrance being blocked. The reliance upon the proposed emergency entrance is insufficient. The use of this access would be subject to confusion and to human error in the event of a real emergency. This issue could be resolved with a condition that requires the plaintiffs to provide a full second access point which is separated from the access on Hurley Road.²

The next health and safety concern of the Commission involves inadequate internal traffic circulation and inadequate turning radii to permit fire trucks to turn in the hammerheads on the dead end roads. There are 9 dead-end roads with hammerhead turnarounds at the end of each. Although the plaintiffs revised their plan to increase the size of the hammerheads, the Commission's expert as well as the Oxford Fire Department opined that they were still too cramped to permit large fire trucks to execute efficient 3-point turns, even assuming that there are no cars parked in the hammerheads and that there are no snow piles which infringe on the paved roadway. The Commission's engineering expert, David Nafis, is also of the opinion that despite the increase in size of the hammerheads, they are still not large enough for the SU-30 fire truck to turn around. This concern ties in with the next concern expressed by the Commission which deals with inadequate parking.³ The Commission's expert believes that the lack of parking at the units may lead people to park in the hammerheads. Since the interior

roads and hammerheads will be private, the town will have no authority to enforce parking restrictions. Although the plaintiffs dispute the Commission's findings, my own review of the record is in accord with that of the Commission. The design of the dead-end streets and the lack of space to park at the units will undoubtedly lead to improper parking in places which will make it very difficult for fire trucks to maneuver. I agree with the Commission's view that these are health and safety deficits in the site plan which clearly outweigh the need for affordable housing. However, these concerns can be handled with reasonable conditions which would require the amendment of the site plan to eliminate these internal traffic deficiencies.

***13** The Commissions had other health and safety concerns as well, including inadequate provision for snow removal and unacceptable erosion and drainage on the west side of the property. My own review of the record reveals that these concerns rise to the level of health and safety risks which clearly outweigh the need for affordable housing, but that each could be easily addressed with reasonable conditions.

VI. Remedy

The court sustains the appeal and remands this matter to the Commission and orders it to approve the text amendment to the Zoning Regulations and the amendment to the zoning map, and to approve the site plan and zoning permit applications subject to reasonable and necessary conditions, not inconsistent with this decision, for: 1) a full second access road which is separated from the access on Hurley Road; 2) additional parking; 3) redesign of the hammerheads at the ends of the interior streets to permit fire trucks to make efficient turns; 4) snow removal in the hammerheads; and 5) erosion and drainage on the west side of the property.

All Citations

Not Reported in A.2d, 2009 WL 4282204, 48 Conn. L. Rptr. 743

Footnotes

- 1** The final revision of the site plan calls for this strip to 16 feet wide, at a maximum grade of 12% and to have a surface of "PVC pavers with topsoil and grass."
- 2** The record reflects that the plaintiffs' position at the June 7, 2007 hearing was that they believed it was preferable to have a second access-way and had applied to the Connecticut Department of Transportation for permission to provide a full access-way onto Oxford Airport Road, or, in the alternative, an emergency means of access. There is a letter of denial in the record from DOT, both for full access and for emergency access, based upon reasons which are not analyzed in this appeal. In any event, the record reflects that the plaintiffs claim to have withdrawn their application to DOT before action was to be taken by DOT. Therefore, the plaintiffs claim that the letter of denial from DOT "must be regarded as an advisory statement as to what would have happened had the application been pursued, rather than a denial per se."
- 3** The site plan calls for one or two-car garages for parking plus spaces for two cars in the driveways.


CERTIFICATION

I hereby certify that a copy of the above was or will be delivered electronically on January 22, 2019, to all attorneys and self-represented parties of record and to all parties who have not appeared in this matter and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery:

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